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In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and JAMES T. McINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the Director of the Office of Management and Budget, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-48a) is not yet reported. The opinion of the dis-

trict court (App. B, *infra*, 49a-58a) is reported at 395 F. Supp. 1187.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether annual budget requests by federal agencies to the Office of Management and Budget and recommendations by OMB to the President, concerning items to be included in the President's Budget for previously enacted federal programs affecting the environment, constitute "proposals for legislation" significantly affecting the quality of the human environment so as to require preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(B), imposes judicially enforceable obligations on the Office of Management and Budget to adopt procedures and regulations to identify agency budget requests that must be accompanied by environmental impact statements.

STATUTES INVOLVED

1. Budget and Accounting Act, 1921

Sections 2, 201(a)(5), 207, 215, and 216(a) of the Budget and Accounting Act, 1921, 31 U.S.C. 2, 11(a)(5), 16, 23, 24(a), provide in part:

SEC. 2. When used in this Act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including any independent regulatory commission or board and the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States; * * * *.

SEC. 201. (a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *. The Budget shall set forth in such form and detail as the President may determine—

* * * * *

(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year, and projections for the four fiscal years immediately following the ensuing fiscal year * * *.

* * * * *

SEC. 207. * * * The Office [of Management and Budget [1]], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments.

SEC. 215. The head of each department and establishment shall submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine. In case of his failure to do so, the President shall cause such requests to be prepared as are necessary to enable him to include such requests with the Budget in respect to the work of such department or establishment.

SEC. 216. (a) Requests for regular, supplemental, or deficiency appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted as the President may determine in accordance with the provisions of section 201.

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[1] Since July 1, 1970, the budget preparation functions described in Section 207 of the Act and formerly performed by the Bureau of the Budget have been performed by the Director of the Office of Management and Budget. Under Section 101 of the Reorganization Plan No. 2 of 1970, 84 Stat. 2085, "all functions vested by law" in the Bureau of the Budget or its Director were transferred to the President. The President thereupon delegated these functions to the Director of the Office of Management and Budget within the Executive Office of the President. Executive Order No. 11541, 35 Fed. Reg. 10737 (1970).

2. National Environmental Policy Act of 1969

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, provides in part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the responsible official * * *.

STATEMENT

1. In July 1974, the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council ("respondents") initiated this action against the Secretary of the Interior and the Director of the Office of Management and Budget (OMB). Respondents are environmental organizations with a combined membership of approximately 200,000. They alleged that many of their members use the National Wildlife Refuge System (the Sys-

tem), a network of more than 350 wildlife refuge areas, encompassing more than 30 million acres, that is administered by the Fish and Wildlife Service of the Department of the Interior.[2] Respondents alleged that their members are adversely affected in their use of the System by the environmental impact of proposals made by Interior and by OMB concerning the operation and maintenance of the System.

Respondents claimed that when Interior submits its annual budget request for the System to OMB, and when OMB in turn recommends an annual level of funding for the System for the President to include in the Budget he submits to Congress, these communications are "recommendation[s] or report[s] on proposals for legislation * * * significantly affecting the quality of the human environment * * *" under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Therefore, respondents alleged, these budget communications must be accompanied by an environmental impact statement (EIS) as provided in that Section. Respondents alleged that no such environmental impact statements were prepared, and they sought a declaratory judgment directing Interior and OMB to prepare, consider, and disseminate an environmental impact statement in connection with each annual budget recommendation or request for the Wildlife Refuge System. They also sought a declaration that, under Section 102(2)(B) of NEPA, 42 U.S.C. 4332

[2] The Refuge System is organized under the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd *et seq.*

(2)(B), OMB must establish formal methods and procedures to identify those submissions made by federal agencies during the budget process that must be accompanied by environmental impact statements.[3]

In their answer to the complaint, OMB and Interior admitted that they had not prepared an environmental impact statement for any annual budget request they had made for the Refuge System. They maintained that Section 102(2)(C) of NEPA does not require agencies to prepare environmental impact statements in connection with annual budget requests or recommendations. They submitted affidavits describing the numerous steps involved in the preparation of the President's annual Budget insofar as it relates to the Refuge System, the time constraints imposed by a process that must be repeated annually, the need for confidentiality, and the other conditions under which budget decisions are made within the Executive Branch.[4] In the view of OMB and Interior, these facts demonstrated that it not only would be impractical, but inconsistent with the nature and process of executive decision-making, to impose the

[3] An additional claim in the complaint was that Interior and OMB, without public notice, had made "major policy decisions" to cut back, curtail, and underfinance the operations of the Refuge System. Interior was accused of violating NEPA because it had failed to prepare an environmental impact statement to accompany its alleged adoption of this policy. Interior and OMB denied that such a policy had been adopted. The district court made no finding or ruling as to whether such a policy had been adopted.

[4] The affidavits are set forth as Appendices E and F, *infra*, 63a-78a.

requirement of environmental impact statements on the budget preparation process.

2. The district court granted summary judgment for respondents. The district court held that agency budget requests are "proposals for legislation" within the meaning of Section 102(2)(C) of NEPA, and that OMB and Interior must therefore prepare, consider, and disseminate an environmental impact statement on every annual request or recommendation they make for funding the environmentally-significant Refuge System (App. D, *infra*, 61a). The court found support for its conclusion in the congressional objective of ensuring executive consideration of environmental values during the "constant revision and reevaluation of ongoing projects" (App. B, *infra*, 50a, quoting *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972)).[5] The court stated

[5] The court further relied (App. B, *infra*, 50a-52a) on guidelines adopted by the Council on Environmental Quality (CEQ) providing that agencies are to prepare environmental impact statements on "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 C.F.R. 1500.5 (1977). The court of appeals also gave weight to the CEQ guidelines (App. A, *infra*, 6a n.8), though Judge MacKinnon in dissent stated that they were ambiguous and viewed them as not inconsistent with his interpretation of the Act (*id.* at 34a n.9, 41a & n.11). In any event, since the decision of the court of appeals, CEQ has proposed to adopt regulations to amend this portion of its guidelines to provide that " '[l]egislation' * * * does not include requests for appropriations." 43 Fed. Reg. 25244, 25245 (1978). (A footnote states, *id.* at n.1, that CEQ "in consultation with OMB had been prepared to propose this wording" before the decision of the court of appeals in this case, and invites "comment on the implications of that case" for the proposal.)

that since EIS preparation can begin before the budget request is made, "it is irrelevant that final budget decisions are presently made in a very short time frame" (App. B, *infra*, 54a). The court said the effect of its decision would be limited because (*id.* at 55a) "[a]ppropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required." The court rejected the government's claim of confidentiality for appropriation requests, and accordingly found no bar to requiring publicly-disseminated environmental impact statements to accompany those requests (*id.* at 55a-57a). Finally, without discussion, the court held that Section 102(2)(B) of NEPA requires OMB "to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated" (App. D, *infra*, 62a).

3. On appeal, the District of Columbia Circuit first addressed the question of standing. The respondent organizations had submitted no affidavits or other evidence to support their allegations that their members used the Refuge System and were adversely affected by the environmental impact of budgetary requests concerning the System (App. A, *infra*, 8a).[6]

[6] Respondents also claimed standing on the basis of their organizational interests in obtaining, evaluating, and disseminating the budgetary information concerning the Refuge System which they asserted that NEPA required the agencies to compile and disclose (App. A, *infra* 9a n.16). The court of appeals found it unnecessary to pursue this theory (*ibid.*).

The court noted, however, that the government had not specifically contested respondents' allegations (*id.* at 9a). The court reasoned that since respondents could almost certainly show that at least some of their members use the Refuge System, they could satisfy the "minimal" standing requirements of *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) (App. A, *infra*, 8a). Hence the government's "general denial" of standing did not require that a trial be held to resolve the issue (*id.* at 9a). The court added, however, that if a genuine issue of fact was raised concerning the use of the wildlife refuges by respondents' members, the government could contest the issue in appropriate proceedings on remand (*ibid.*).[7]

On the merits, the court of appeals agreed with the district court that Congress intended the EIS requirement of Section 102(2)(C) to apply to the budget preparation process (*id.* at 10a-14a). The court of appeals concluded, however, that application of the EIS requirement to "every budget request for the annual operation * * * of an agency whose activities may have significant environmental impact" would "trivialize NEPA" (*id.* at 14a, 17a).[8] In order

[7] Judge MacKinnon stated in dissent that respondents should be required to demonstrate not only that their members use the wildlife refuges, but also that there is "a causal connection between the proposed appropriation [under consideration by Interior or OMB] and some identifiable decline in one of [their] members' use of a wildlife refuge" (App. A, *infra*, 27a).

[8] Despite the district court's suggestion that its ruling would have only a limited effect, the court of appeals noted that the phrase "significantly affecting the quality of the human environment" in Section 102(2)(C) has received a broad application and could apply, for example, to activities of the ICC and the SEC (App. A, *infra*, 14a n.27) (citing *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320-321, 322-327 (1975), and *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689 (D. D.C. 1974).

to provide "a limiting principle" (*id.* at 15a), the court concluded that the Act's reference to "proposals for legislation" should be understood to encompass proposals for "taking new action which significantly changes the status quo, not * * * a routine request for budget approval and appropriations for continuance and management of an ongoing program" (*id.* at 17a). In addition, even where there is no proposal to change the status quo, the EIS requirement would apply

> to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. * * * Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review.

App. A, *infra*, 17a & n.32. The court summarized its holding by stating that "an EIS is required when such a new look is had. * * * It is impossible to have a 'new look' at everything all the time. When there is such a new look the ensuing request for appropriations is a 'proposal for legislation' under NEPA." *Id.* at 18a.

Applying this "new look" principle to this case, the court observed that, subsequent to the decision of the district court, the Department of the Interior, in the exercise of its discretion, had completed a "programmatic EIS" for the Refuge System (*id.* at 18a).[9] The adequacy of this EIS as a long term analysis that evaluates the environmental consequences of the proposed and alternative levels of funding for the System over the next decade was not challenged by respondents (*id.* at 19a).[10] The court accordingly held that "there is no further obligation under NEPA at this time" with respect to budget requests for the Wildlife Refuge System (*id.* at 23a), and it reversed the portion of the district court's judgment that directed Interior and OMB to prepare an EIS on each annual budget request for the System (*id.* at 19a).

The court of appeals affirmed, however, the portion of the district court's order that directed OMB to develop formal methods and procedures to identify those agency actions that require environmental statements (*id.* at 20a-23a). The court held that NEPA requires OMB, "as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies" (*id.* at 20a). It indicated that such guidance was particularly important in view of

[9] The draft environmental statement was issued in November 1975 (40 Fed. Reg. 54451, 55376, 55378) and the final EIS, entitled *Final Environmental Statement: Operation of the National Wildlife Refuge System,* in November 1976. 41 Fed. Reg. 53129.

[10] The agency indicated that it intended to update the programmatic EIS in the future to give account to altered plans or circumstances. App. A, *infra,* 18a.

the court's holding that some but not all budget requests constitute "proposals for legislation" under the Act (*id.* at 19a-20a). OMB was thus directed "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed" (*id.* at 21a).

Judge MacKinnon dissented from the principal holdings of the court. He noted that under this Court's decisions in *Kleppe* v. *Sierra Club,* 427 U.S. 390, 404 (1976), and *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289, 320 (1975), as well as the language of the Act, the EIS requirement of Section 102(2)(C) becomes applicable only when a final "proposal" for federal action is made (App. A, *infra,* 28a-30a). Since "in the budget-making process there is no final proposal until the President includes the item in his budget to Congress" (*id.* at 29a), the prior requests, recommendations, discussions, and negotiations concerning agency budget items within the Executive Branch are not sufficiently final to be subject to the EIS requirement. This conclusion is reinforced, Judge MacKinnon argued, by the confidentiality of the federal Budget until it is released by the President. Preparation and publication of environmental studies on budget requests would interfere, in particular, with "the confidential nature of the communications between the President and units within the Executive Office" (*id.* at 45a).

Moreover, even if budget requests were "proposals" under the Act. they still would not be "proposals for

legislation," Judge MacKinnon argued. Congress has traditionally distinguished between "legislation" and "appropriations," and there is no reason to think that it departed from its customary usage here (*id.* at 31a-41a). Thus, agreeing with the majority that "it would be absurd to construe [NEPA] and its implementing regulations to require an EIS with each annual budget request," Judge MacKinnon found it "even more absurd—and equally contrary to the language of the statute—" to construe it to require the agency "to produce the half-way measure of a 'programmatic' environmental statement" (*id.* at 48a).

Finally, Judge MacKinnon disagreed with the majority's conclusion that Section 102(2)(B) imposes any duty on OMB to issue guidelines to federal agencies concerning their obligations, as declared by the majority, to prepare and publish environmental impact statements in connection with budget requests. To the extent that regulations governing environmental studies are required of agencies under the Act, Judge MacKinnon found nothing to suggest that regulations adopted by agencies for their own use, such as those of the Department of the Interior, are not sufficient. *Id.* at 46a-47a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that annual budget submissions made by federal agencies to OMB and by OMB to the President for programs affecting the environment constitute "proposals for legislation" that must be accompanied by environmental impact

statements under NEPA, though the court limited its holding to submissions that would "significantly change[] the status quo" or that reflect an agency's "new look" at a program. This holding marks the first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress.[11]

The decision is exceptional in its willingness to infer, in the face of substantial contrary evidence, a congressional intent to interpose procedural obstacles to the free communication of information, recommendations, and policy choices concerning budget decisions for which the President is responsible. Given the time constraints, the need for political flexibility,[12]

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[11] We know of two other decisions applying NEPA to the budgetary process. In *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1181-1182 (6th Cir. 1972), it was held that the agency was required to prepare an environmental impact statement on its requested appropriations to complete a construction project. In *Aluli* v. *Brown*, 437 F.Supp. 602 (D. Haw. 1977), appeal pending, a district court required the Navy to prepare an environmental impact statement on its use of a target range on Kahoolawe Island, Hawaii, in connection with each annual budget request by the Department of Defense that contains funds to finance such use. Other courts have refused to impose procedural conditions or reporting or disclosure requirements on the budget-making process. *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172, 175 (N.D. Cal. 1976); *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D. D.C. July 20, 1978), appeal pending. See also *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973); *Harrington* v. *Bush*, 553 F.2d 190, 194-195 (D.C. Cir. 1977).

[12] See A. Wildavsky, *The Politics of the Budget Process* (1964).

the tradition of confidentiality, and the other conditions that characterize the budget-making process, the decision casts doubt on the continued ability of the executive to conduct the process effectively. In holding that budget submissions are subject to judicial review under NEPA, and that a vaguely defined class of them must be accompanied by environmental impact statements, the court has established an amorphous right of public intervention in the preliminary stages of executive policy formulation. Additional litigation seeking to define and enlarge this right can be expected.

None of these results is warranted. In reaching its decision the court of appeals has failed to conform to the intention of Congress and to decisions of this Court that articulate a narrower scope for NEPA's requirement of environmental impact statements.

1. In holding that budget requests by federal agencies to OMB [13] and by OMB to the President constitute

[13] Although the declaratory judgment of the district court that the Secretary of the Interior must prepare impact statements in connection with budget requests for the Refuge System was reversed because of the EIS that the Secretary voluntarily prepared (see page 12, *supra*), the Secretary retains a litigable interest in this case. The decision of the court of appeals, unless reversed, will require the Secretary to prepare additional impact statements in connection with budget requests involving a "new look" at either the Refuge System or other Departmental programs. Moreover, the portion of the judgment that requires OMB to issue guidelines directing other agencies (including Interior) to prepare impact statements in connection with "new look" budget requests (see pages 12-13, *supra*) constitutes an indirect imposition of this requirement on the Secretary.

"proposals" for legislation under Section 102(2)(C), the decision of the court of appeals conflicts with decisions of this Court. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976), the Court held that Section 102(2)(C) gives a court "no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal" at which an impact statement must be prepared. Instead, "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975) (*SCRAP II*) (emphasis in original).'" 427 U.S. at 406.

Only the President is empowered to submit the Budget to Congress. He is required to do so by statute (31 U.S.C. 11),[14] and he does so also in the exercise of his constitutional responsibility to recommend to Congress "such Measures as he shall judge necessary and expedient" (Article II, Section 3). Thus, even assuming that congressional appropriations constitute "legislation" under NEPA (but see Point 2, *infra*), it is not until the President has submitted the Budget to Congress that any such legislation has been "proposed." Agency budget requests to OMB are pre-decisional, and so are OMB's recommenda-

[14] "The President shall transmit to Congress during the first fifteen days of each regular session, the Budget, * * *." 31 U.S.C. 11(a).

tions to the President.[15] The requests, recommendations, discussions, and negotiations on the budget within the Executive Branch constitute the "germination process" of the President's Budget proposals. See *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.[16]

The conclusion that executive communications on the budget are not "proposals" under NEPA is consistent with Congress's own understanding of the budget-making process. The Budget and Accounting Act (31 U.S.C. 1 *et seq.*), which governs that process, was enacted in 1921, a half-century before NEPA. When NEPA was adopted, Congress was well acquainted not only with the intricacies and constraints of the budget-making process in general, but specifically with the longstanding practice that

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[15] In preparing the Budget, OMB operates as a unit "in the Executive Office of the President," and "under such rules and regulations as the President may prescribe." 31 U.S.C. 16. See also note 1, *supra*.

[16] The court of appeals attempted to distinguish this case from *Kleppe* by stating that *Kleppe* "was based on the finding that there was no program to analyze," whereas here the Refuge System is a federal program (App. A, *infra*, 16a n.29). But the court, in quoting from one portion of the opinion in *Kleppe* (427 U.S. at 400-401), disregarded the subsequent portion of the opinion (*id.* at 404-406) in which this Court assumed "that a regional program was contemplated" (*id.* at 404) and held that the court of appeals had nonetheless erred in requiring that an EIS be prepared "at some point prior to the formal recommendation or report on a proposal" (*id.* at 404). The Court noted that "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action * * *" (*id.* at 406).

agency budget requests remain confidential until the President transmits the Budget to Congress. Indeed, in Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, Congress has prohibited the disclosure to Congress or to congressional committees of an agency's appropriations request that has not been approved by the President, "unless at the request of either House of Congress." Congress has altered this practice only with respect to two specific agencies.[17] Also, Congress has long been aware of executive policy mandating the confidentiality of budget communications within the Executive Branch.[18] It has

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[17] The Consumer Product Safety Commission and the Commodity Futures Trading Commission are required to submit their appropriations requests to Congress at the same time that they submit them to OMB and the President. Consumer Product Safety Act, Section 27(k)(1), 15 U.S.C. 2076(k)(1); Commodity Futures Trading Commission Act of 1974, Section 101(3), 7 U.S.C. 4a(h)(1).

[18] Paragraph 3 of OMB Circular A-10 (revised Nov. 12, 1976) states:

> *Requirements for confidentiality prior to official transmittal.* The confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. Presidential budget decisions are not final until the budget itself is transmitted to Congress. Amendments to the budget and supplemental appropriation requests may also follow the transmittal of the budget. Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head

taken no action to challenge that policy (except with respect to two agencies, see note 17, *supra*), and has not suggested application of an EIS requirement to budget requests.

It is therefore most unlikely that Congress in enacting NEPA intended to require that environmental impact statements accompany budget requests within the Executive Branch. To interject published commentary into what has been and remains a confidential process would have been a conspicuous departure from existing budgetary practices. Nothing in the history of the Act suggests that Congress contemplated such a result.[19]

2. Even if budget submissions by federal agencies and OMB were "proposals" under Section 102(2)(C), they would not be "proposals for legislation." As Judge MacKinnon explained in his dissent (App. A, *infra*, 30a-41a), Congress has traditionally distinguished between "legislation" and "appropriations."

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of each agency is responsible for preventing premature disclosures of this budgetary information.

A prior, similar version of Circular A-10, revised Jan. 18, 1964, is quoted in the dissenting opinion of Judge MacKinnon (App. A, *infra*, 44a).

[19] Indeed, constitutional questions might be posed by congressional requirements that executive agencies and OMB expand the contents of budgetary materials they send the President by including environmental impact statements and that they make those statements public. The President has authority to receive information from departments and agencies, and from advisers within his Executive Office, free from congressional and judicial regulation. See, *e.g.*, Article II, Section 2, Clause 1 of the Constitution.

Legislation is the making of substantive rules, including the authorizing of new programs; appropriation is the funding of previously authorized programs. Thus, under the Rules of the House, "Language in [a general] appropriation bill changing existing law is legislation and not in order." Rule XXI, Clause 2, as stated in *Deschler's Procedure* 295 (1974); see also 4 *Hinds' Precedents* §§ 3811-3812 (1907); Standing Rules of the Senate, Rule 16.4; *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 35-36.

Congress has frequently been confronted with the contrast between legislation and appropriations in its procedural rulings and has maintained a sharp distinction in the proper usage of those terms. See, *e.g.*, 7 *Cannon's Precedents* §§ 1172, 1410, 1443, 1445, 1448, 1454, 1459, 1463, 1471, 1472 (1941). Congress has also made the distinction in numerous statutes that refer separately to "legislation" and "appropriation." *E.g.*, 18 U.S.C. 1913 (proscribing the use of appropriated funds to influence any congressman to favor or oppose "any legislation or appropriation"); 22 U.S.C. 2394(c); 42 U.S.C. (1970 ed. & Supp. V) 2996e(c)(2)(B). As this Court stated recently in *TVA* v. *Hill*, *supra*, slip op. 35: "We recognize that both substantive enactments and appropriations measures are 'acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs." Since the distinction is so deeply ingrained in congressional usage, it is reasonable to infer that when Congress in Section 102

(2)(C) used the word "legislation" with reference to its own activity, it intended to convey the same meaning that it customarily gives the term.

Application of this traditional distinction in the context of Section 102(2)(C) yields a reasonable statutory scheme. An environmental impact statement is required with respect to every proposal for new substantive "legislation," such as the institution of a new program, and an EIS is also required whenever specific actions implementing such legislation will constitute "major Federal actions significantly affecting the quality of the human environment * * *." 42 U.S.C. 4332(2)(C). Construing Section 102(2)(C) to apply to "legislation," but not to "appropriations," removes only the requirement of an additional and probably unnecessary EIS review at the intermediate stage when annual budget requests to finance previously enacted legislation are formulated.

In contrast, to consider every budget request a "proposal for legislation" would, as the court of appeals recognized, "trivialize NEPA" and reach "ridiculous extremes" (App. A, *infra*, 17a, 22a-23a). Yet the "new look" doctrine devised by the court in order to provide "a limiting principle" is no easier to defend. It has no foundation in the statutory language, but rests instead on "a balancing of court-devised factors" very comparable to the approach this Court rejected in *Kleppe*, *supra*, 427 U.S. at 406. The court of appeals' analysis provides sparse guidance to enable agencies and OMB to determine when a budget

request involves a "new look," or "ushers in a considered programmatic course following a programmatic review" (App. A, *infra*, 17a). The court's decision "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation." *Kleppe*, *supra*, 427 U.S. at 406. The "limiting principle" that Congress itself employed in Section 102(2)(C) was to create an EIS requirement for "legislation" but not for "appropriations." [20]

3. The court of appeals concluded that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), imposes a duty on OMB "to develop methods and procedures to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation" (App. A, *infra*, 23a). For

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[20] Although the question is not presented here, nothing in NEPA would require the President to submit an EIS to Congress at the time the Budget is transmitted. The Budget is "proposed" at that time, but the proposal is not for "legislation." In addition, Section 102(2) applies only to "agencies of the Federal Government," and the President is not an "agency." Most important, any construction of NEPA that sought to impose judicially enforceable limitations on the President's authority and ability to communicate budget requests to Congress would risk "breaching the separation of powers doctrine, and potentially infringing upon the President's constitutional power to present recommendations for legislation to the Congress." *Chamber of Commerce* v. *Department of Interior*, 439 F.Supp. 762, 767 (D. D.C. 1977); see *Wingfield* v. *OMB*, 9 E.R.C. 1961, 1963 (D. D.C. 1977).

the reasons set forth above, we submit that budget requests by executive agencies are not "proposals for legislation" under Section 102(2)(C) of NEPA and that neither OMB nor any other agency is thus required to prepare an EIS in connection with budget submissions. It follows that, contrary to the court's holding, NEPA imposes no duty on OMB to advise other agencies concerning their EIS responsibilities in the budget process.

But even if we assume that Section 102(2)(C) requires agencies to prepare impact statements in connection with "some but not all" budget requests (App. A, *infra*, 19a-20a), the court of appeals erred in concluding that Section 102(2)(B) imposes a judicially enforceable obligation on OMB to promulgate EIS guidelines for other agencies. Section 102(2)(B) provides that all federal agencies are to

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

Assuming that this generalized language is judicially enforceable at all, it does not direct OMB to adopt procedures to guide other agencies concerning the independent responsibilities they may have under Section 102(2)(C) to prepare environmental impact statements. Instead, Section 102(2)(C) itself provides that the EIS is to be prepared "by the responsible official" for the agency that makes a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." Thus, as Judge MacKinnon concluded in his dissent (App. A, *infra*, 46a-47a), it is the Department of the Interior, not OMB, that is responsible for determining when an EIS should be prepared in connection with that Department's "proposals for legislation." The court's judgment represents an unwarranted interference not only with the internal allocation of responsibilities by the Executive Branch, but also with the allocation of EIS responsibility by NEPA itself.

Moreover, respondents lack standing to raise any claim under Section 102(2)(B). The court of appeals did not consider separately the questions whether respondents have standing to sue under Section 102(2)(C) and Section 102(2)(B). The court concluded generally that if respondents' members use wildlife refuge areas that are adversely affected by spending decisions for the Refuge System, they have standing in this case (App. A, *infra*, 8a). We concede that members of the respondent organizations use wildlife refuge areas and that their use may be adversely affected by the environmental impact of decisions reducing the funds available for operation and maintenance of the Refuge System. Furthermore, when an agency fails to prepare an EIS that is required by Section 102(2)(C), and this failure leads to a governmental decision adverse to the

environmental interests that NEPA is designed to protect, it would appear that the injury alleged "fairly can be traced" to the allegedly unlawful action. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n.25 (1976). We therefore do not dispute that respondents have standing to claim that an EIS is required under Section 102(2)(C) in the context of this case (though, of course, we dispute that claim on its merits).

Respondents do not have standing, however, to raise any claim under Section 102(2)(B). Respondents cannot show that OMB's failure to adopt guidelines under Section 102(2)(B) caused the Department of the Interior's failure to prepare an EIS in connection with its annual budget requests for the Wildlife Refuge System. Respondents claim only that OMB should issue guidelines to elaborate the asserted EIS responsibility of federal agencies during the budget process. But such guidelines would neither add to, nor detract from, the duty of each agency to prepare an EIS when Section 102(2)(C) so requires (see App. A, *infra*, 20a). Any claim that respondents are injured by the absence of executive guidelines requiring agencies to do what they (assumedly) are already required to do by statute is based on "unadorned speculation" about the internal processes of government and does not "suffice to invoke the federal judicial power." *Simon*, *supra*, 426 U.S. at 44. See also *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

Accordingly, while respondents' allegations are sufficient for standing under Section 102(2)(C), they

do not provide standing for the claim respondents have raised under Section 102(2)(B). Insofar as the complaint alleges a cause of action under Section 102(2)(B), the action should therefore have been dismissed by the district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

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* The Solicitor General is disqualified in this case.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1871

SIERRA CLUB, ET AL.,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. LYNN, DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-1017)

Argued December 7, 1976

Decided May 15, 1978

Peter R. Taft, Assistant Attorney General, Department of Justice, with whom *Raymond N. Zagone*, *L. Mark Wine*, *Dirk D. Snel*, Attorneys, Department of Justice and *Steven Gottlieb*, Assistant General Counsel, Office of Management and Budget, were on the brief, for appellants. Also *Edmund B. Clark*, Attorney, Department of Justice entered an appearance for appellant.

Bruce J. Terris, with whom *Zona F. Hostetler* was on the brief, for appellees.

Before: BAZELON, LEVENTHAL and MACKINNON, *Circuit Judges*

Opinion filed by *Circuit Judge* MACKINNON, concurring in part and dissenting in part.

Before: BAZELON, *Chief Judge*, LEVENTHAL and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: The central legal issue in this case is whether and on what occasions the National Environmental Policy Act (NEPA) requires an agency to prepare an environmental impact statement (EIS) to accompany its annual budget request for the operation of a program having significant environmental consequences.

The particular program that occasioned the lawsuit is the National Wildlife Refuge System (sometimes referred to as System, or NWRS). The System is administered by the Department of the Interior's Fish and Wildlife Service (sometimes referred to as Service, or FWS).

Since the commencement of this suit, the FWS has prepared a programmatic environmental statement on the program which covers operation of the NWRS for the next ten years, centering on a projection of a roughly constant level of funding. No challenge has been made to the adequacy of this EIS. Rather, plaintiffs obtained, and now seek affirmance of, the district court's declaratory ruling that an EIS adequate to then existing circumstances is required with each annual budget request. We reject this *per se* position and hold that the statement prepared by the Service satisfies its NEPA obligations, subject to any future decision of the agency to reevaluate the program or a drastic change of circumstances affecting the operation of the program.

We affirm the district court's other declaratory ruling that the Office of Management and Budget (OMB) is required to develop procedures to fulfill its NEPA obligations in connection with the Budget process.

I. BACKGROUND

A. *The National Wildlife Refuge System*

The National Wildlife Refuge System consists of more than 350 refuges containing more than 30 million acres in 49 of the 50 states. The primary purposes of the NWRS are to preserve endangered species and to sustain populations of migratory birds, particularly waterfowl, by maintaining intact a diverse network of their natural habitats. A secondary purpose of the System is to provide for its educational and recreational use (study, observation, and hunting) by people.

The System is administered by the Service according to the provisions of several statutes.[1] Much of the refuge land was acquired during the 1930's. After a period of little growth during the 1940's and 50's, the System has been enlarged during the 60's and to the present, particularly in the area of wild rivers and of wetlands. (There has recently been increasing recognition of the contribution to the preservation of important wildlife made by wetlands, which have been rapidly depleted.) During this period of territorial growth, new statutory mandates (such as the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543), and increased public use of the NWRS, the resources devoted to staff and maintain the Refuge System have not kept up with the rate of terri-

[1] The most significant of these are:

Fish and Wildlife Coordination Act of 1934, 16 U.S.C. 661; Fish and Wildlife Act of 1956, 16 U.S.C. 742a; Migratory Bird Conservation Act, 16 U.S.C. 715; and Endangered Species Act of 1973, 16 U.S.C. 1531.

torial growth.[2] Between 1973 and 1976, there was a 7% decrease in staffing, while the number of field stations increased by 10 percent.[3] This has led to a substantial ($83 million) backlog of rehabilitation work, as well as unfulfilled construction work, new and replacement, *e.g.*, water control structures, roads, and buildings.[4] Given the policy decision to plan for roughly constant total expenditure (approximately $43 million in 1974 dollars), the FWS focuses on a strategy of increasing the effectiveness of the NWRS in its primary conservation task, while gradually reducing its direct use by the public. The Service's statement (FES) analyzes the environmental consequences of this proposed strategy, alternatives, and mitigating measures.

B. *Plaintiffs' Contentions*

Plaintiffs are three environmental organizations. Their standing will be discussed subsequently. They advance two arguments that section 102(2)(C) of NEPA[5] obligates

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[2] Final Environmental Statement, Operation of the National Wildlife Refuge System, U.S. Fish and Wildlife Service, Department of the Interior, November, 1976 at I-8 through I-9 [hereinafter FES at I8-I9].

[3] *Id.* at I8.

[4] *Id.* at I9.

[5] Section 102(2)(C), 42 U.S.C. § 4332(2)(C), provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> * * * *
>
> (2) all agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the

> human environment, a[n environmental impact statement]. . . .
>
> * * * *
>
> Copies of such statement . . . shall be made available . . . to the public as provided by section 552 of title 5, United States Code [the Freedom of Information Act], and shall accompany the proposal through the existing agency review processes.

[6] Section 102(2)(B), 42 U.S.C. § 4332(2)(B) directs all agencies of the federal Government to:

> identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.

[7] Sierra Club v. Morton [National Wildlife Refuge System], 395 F. Supp. 1187 (D.D.C. 1975).

the Service to prepare an EIS on each annual budget request for the System: (a) that past and present proposals to cut down on NWRS operations are "proposals for legislation . . . significantly affecting the quality of the human environment . . .," or (b) that the NWRS is so vital to protection of the environment that the annual proposal on the scope and nature of its operation *per se* "significantly affect[s] the quality of the human environment."

Plaintiffs further contend that section 102(2)(B) of NEPA[6] requires OMB to develop procedures to assure consideration of environmental factors in the budget process, including identification of which budget requests have significant environmental consequences and what is required of the agencies of the executive branch in submitting these requests to OMB.

C. *District Court Decision*

The district court granted summary judgment for the plaintiffs[7] on the basis of the *per se* argument concern-

ing budget proposals for operation of a major environmental program such as the NWRS. The court relied on the guidelines implementing NEPA issued by the Council on Environmental Quality (CEQ). These guidelines explicitly include "requests for appropriations" within the definition of "action" for NEPA purposes.[8] The court also relied on cases requiring an EIS in connection with the request for appropriations to construct or otherwise

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[8] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1188, *citing* 40 C.F.R. § 1500.5(a)(1) which provides:

> "Actions" include but are not limited to:
>
> (1) Recommendations or favorable reports relating to legislation including requests for appropriations.

CEQ was established by NEPA in part to oversee implementation of NEPA. Its guidelines, issued by authority of Executive Order 11514, § 3(h) (1970), 3 C.F.R. § 272 (1974), are entitled to considerable weight. *E.g.* Scientists' Institute for Public Information v. AEC [SIPI], 156 U.S.App.D.C. 395, 404, 481 F.2d 1079, 1088 (1973); Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1178 (6th Cir. 1972); Greene Co. Planning Board v. FPC, 455 F.2d 412, 421 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972); Sierra Club v. Morton [Northern Great Plains Coal], 169 U.S.App.D.C. 20, 35 n.22, 37 n.24, 514 F.2d 856, 871 n.22, 873 n.24 (1975) *rev'd on other grounds sub. nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976).

The Department of Interior's Manual is in accord with the CEQ Guidelines, stating:

> The following criteria are to be used in deciding whether a proposed action requires the preparation of an environmental statement:
>
> A. Types of Federal actions to be considered include, but are not limited to:
>
> (1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations.

Department of the Interior Manual § 516.5, 36 Fed. Reg. 19344 (Oct. 2, 1971).

initiate a specific project.[9] The court took note of the programmatic environmental statement being prepared by the defendants, but held that since it was directed at the long range goals of the NWRS, it would not satisfy the NEPA requirement of an analysis specifically directed to the proposed action in a "finely tuned" manner.[10] Accordingly, the district court granted the plaintiffs declaratory relief that the defendants were in violation of NEPA, that an EIS was required on the annual budget proposal for the NWRS, and that OMB was required

> to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.[11]

II. Standing

The defendants challenge the summary judgment granted to plaintiffs in view of their failure to adduce proof of injury in the face of defendants' denial of plaintiffs' standing and assertion of a disputed factual issue as to their injury.[12] Plaintiffs alleged in their complaint that

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[9] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1182, *citing* Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1181 (6th Cir. 1972) and Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973) (development of the liquid metal fast breeder reactor).

[10] *National Wildlife Refuge System, supra,* 395 F. Supp. at 1191.

[11] *National Wildlife Refuge System, supra,* Civ. No. 74-1017, Order at 1 (D.D.C. June 6, 1975), J.A. 92.

[12] "Plaintiffs have no standing to maintain this action." National Wildlife Refuge System, *supra,* Answer at 1 (Oct. 11, 1974), J.A. 22. "In order to prevail on their motion [for summary judgment], plaintiffs must demonstrate . . . that there have been significant reductions in refuge operations

their members use the Refuge System and are affected by the environmental impact of the proposal concerning the operation of the System.[13] Alternatively, plaintiffs assert that their organizational interests in disseminating the information which NEPA requires the proposing agency to compile and disclose provide standing under *SIPI*, *supra* note 8, 481 F.2d at 1087 n.29. These allegations were not supported by affidavits in plaintiffs' motion for summary judgment.

There is little doubt in our mind that some of plaintiffs' hundreds of thousands of nature-oriented members use the Refuge System, so that at least one of them could thereby satisfy the "minimal" standing requirements of *Sierra Club v. Morton* [*Mineral King*], 405 U.S. 727, 734 (1972) and *United States v. SCRAP* [SCRAP I], 412 U.S. 669, 688-90 (1973).[14] Plaintiffs did not file specific

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and that they have been injured. None of these facts have been proved." *Id.*, Defendants' Statement of Genuine Issues at 1 (Apr. 8, 1975) J.A. 65.

[13] Plaintiffs, the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council, are environmental-conservation organizations with combined memberships of approximately 200,000. Typical of the standing allegations in the complaint is the following:

> Plaintiff Natural Resources Defense Council, Inc. (NRDC) is suing on behalf of itself and its members. Many of NRDC's members use the National Wildlife Refuges for recreational and other purposes, and are affected by the environmental impacts on these refuges from the proposals for legislation and other major federal actions described in this complaint. They have a right under NEPA to assess and comment on the environmental impacts of, and alternatives to, these proposals. This right is being denied by defendants' failure to fulfill their responsibility under NEPA.

Id., Complaint at 5, (July 5, 1974), J.A. 11.

[14] Sierra Club v. Morton [Northern Great Plains Coal], 169 U.S.App.D.C. 20, 34 n.20, 514 F.2d 856, 870 n.20 (1975),

affidavits to that effect. On the other hand, one can hardly say that the issue was sharply drawn by the defendants' pleadings. In their statement of genuine issues opposing summary judgment, the defendants denied that plaintiffs had "been injured" by operation of the Refuge System or budget decisions concerning the System.[15] However, this point was made in the context of defendants' denial of the allegation that there were plans to reduce the funding of the NWRS with consequent impairment of the Refuge System. Defendants' pleadings did not specifically contest the proposition that plaintiffs' members use and are affected by the System and how the FWS proposes to operate it, which was the underpinning of the *per se* argument accepted by the district court. While we do not minimize the importance of standing requirements, the issue is whether their disposition required a trial to resolve pertinent issues of fact. A trial is not automatically required by a general denial of standing. However, to avoid any possible implication of foreclosure or estoppel, we make it clear that on the remand for further proceedings, if there is a genuine issue as to use of the Refuges by plaintiffs' members, defendants may raise it in appropriate proceedings.[16]

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rev'd on other grounds sub. nom. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

[15] *National Wildlife Refuge System*, *supra*, Defendants' Statement of Genuine Issues at 1 (Apr. 8, 1975), J.A. 65. *See* note 12, *supra*.

[16] Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1172 (6th Cir. 1972). The primary purpose of the EIS in the scheme of NEPA is to assure compliance with its mandate that agencies proposing legislation or action give due consideration to environmental factors. However, the EIS also serves the important additional function of informing other parts of the government and the public of the environmental consequences of the decision. Jones v. D.C. Redevelopment

III. NEPA and the Budget Process

A. *Absolute Positions on NEPA Applicability*

The plaintiffs' position is simple and logical. NEPA requires "all agencies of the Federal Government" to prepare an EIS to accompany "every recommendation or report on proposals for legislation . . . significantly affecting the quality of the human environment." [17] The EIS guidelines of CEQ, the body established by NEPA to implement that statute, defines an "action" subject to the EIS requirement:

> "Actions" include but are not limited to:

Land Agency, 162 U.S.App.D.C. 366, 375, 499 F.2d 502, 511 (1974). Thus, we have held that an organization with an institutional concern with informing both its members and the public on matters of public policy and decisions which fall within the concern of NEPA has a statutory right to the information which NEPA obliges the agency to compile in an EIS. Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 403 n.29, 481 F.2d 1079, 1087 n.29 (1973). In the case of a proposal for legislation—appropriations in *SIPI*, quasi-legislative approval by another agency in *Jones*—the organization has an interest in getting the environmental consequences of the proposal in the open and before the legislature in aid of its participation in the legislative process. The question arises whether this is a legal interest sufficient to maintain an action to enforce NEPA, in effect an interest created by the statute.

This alternative ground of standing was similarly alleged but not supported by affidavits. Since plaintiffs' standing is proper and more straightforward under the members' use doctrine of Sierra Club v. Morton [Mineral King], 405 U.S. 727, 734-35 (1972), we do not anticipate that it will be necessary to pursue the "informational NEPA entitlement" issue in this case.

[17] Section 102(2)(C), 42 U.S.C. § 4332(2)(C).

> (1) Recommendations or favorable reports relating to legislation including requests for appropriations.[18]

The other prerequisite of an EIS requirement, that the action significantly affect the environment, has been given a broad reading in favor of obtaining the benefits of an EIS in instances of borderline environmental significance.[19] Thus, according to the plaintiffs, an EIS is required in connection with the FWS's budget proposal for funding the upcoming fiscal year's operation of a program with great environmental significance, the NWRS.[20]

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[18] 40 C.F.R. 1500.5(a). *See* note 8, *supra*. More generally, the Supreme Court has stated:

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officer or agency charged with its administration.

Udall v. Tallman, 380 U.S. 1, 16 (1965). *See also* E.I. duPont de Nemours v. Train, 430 U.S. 112, 134-35 (1977). This principle has full vitality as to agencies charged with implementing statutes passed with the objective of protecting the environment.

[19] Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service, 159 U.S.App.D.C. 158, 168-69, 487 F.2d 1029, 1039-40 (1973).

[20] Plaintiffs argue that

> the National Wildlife Refuge System, by its very nature, size, and scope, is itself a vital part of the protection of the environment. Consequently, annual proposals for financing programs of the . . . System necessarily have significant effects upon the environment.
>
> * * * * *
>
> [E]ven when the proposed budget is the same as, or more than, the prior year's budget, the proposal not to increase further the budget—to provide, for example, additional staff to protect the wildlife more adequately or service increasing numbers of visitors, to increase rehabilitation of deteriorating facilities, or to purchase more lands for the system—significantly affects the quality of the environment.

Brief for Appellees at 34-35.

The defendants counter that the FWS's proposal to OMB is only an intermediate step in the budget process and that only the actual Budget submitted by the President could be considered a proposal for legislation, and that this presidential submission would be the earliest action possibly triggering NEPA.[21] Defendants deny that NEPA imposes any obligation on OMB in its preparation of the Budget; they rely on the confidentiality of the budget process, *see* 31 U.S.C. §§ 15, 24; and they claim that OMB and FWS are not "agencies"—either within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(1), or under NEPA—when they are acting as advisers and staff assistants to the President in making his Budget.

A similar issue has arisen in connection with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its applicability to entities within the Executive Office of the President. In *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971), without deciding whether the APA definition of "agency" includes the President, we held the Office of Science and Technology (OST) to be an "agency" based on congressional understanding of its role assigned by the reorganization plan in which it was created and in which its position was equated to the Budget Bureau.[22] Congress added a definition of "agency" in the 1974 FOIA amendments to include:

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[21] Aberdeen & Rockfish R.R. Co. v. SCRAP [SCRAP II], 422 U.S. 289, 320-21 (1975).

[22] Soucie v. David, 145 U.S.App.D.C. 144, 151, 448 F.2d 1067, 1074 (1971).

> By virtue of its independent function of evaluation federal programs, the OST must be regarded as an agency, subject to the APA and the Freedom of Information Act.

Id. at 152, 448 F.2d at 1075.

> . . . or other establishment in the executive branch of the Government (including the Executive Office of the President) . . .[23]

The legislative history makes it clear that Congress adopted the *Soucie* result. The Conference Report states:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.[24]

Preparation of the Budget is an aid to Congress as well as an instrument of presidential policymaking and control over the executive bureaucracy. OMB has a statutory duty to prepare the Budget, in addition to its multitudinous other management, coordination, and administrative functions.[25] Congress signified the importance of

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[23] 5 U.S.C. § 552(e).

[24] S.Rep. No. 93-1200, 93rd Cong., 2d Sess. 15 (1974), 1974 U.S. Code Cong. & Ad. News 6293.

[25] There is in the Executive Office of the President an Office of Management and Budget. There shall be in the Office a Director and a Deputy Director, both of whom shall be appointed by the President, by and with the advice and consent of the Senate. The deputy director shall perform such duties as the director may designate, and during the absence or incapacity of the director or during a vacancy in the office of director he shall act as director. The Office, under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for

OMB's power and function, over and above its role as presidential advisor, when it provided, also by amendment in 1974, for Senate confirmation of the Director and Deputy Director of OMB.[26] Thus, OMB is not totally exempt from the FOIA by its definition of "agency." We are equally convinced that OMB is not exempt by definition from NEPA. Exactly what NEPA requires of OMB in the budget process in general is not presented on this appeal and awaits OMB's response to the district court's declaratory judgment that it is OMB's function, at least in the first instance, to delineate the appropriate scope of a NEPA obligation that would be both feasible and meaningful.

We now turn to the question of what NEPA requires, annually or occasionally, in connection with decisions about the operation of the NWRS.

B. *Review of NWRS Operations*

Plaintiffs' logic-based contention (*see* note 20 and accompanying text *supra*) leads logically to the conclusion that an EIS would have to accompany every budget request for the annual operation of an environmental-conservation program, or indeed of an agency whose activities may have significant environmental impact.[27] The

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appropriations of the several departments or establishments.

31 U.S.C. § 16 (1976). *See also* H.Rep. No. 93-697, 93rd Cong., 2d Sess. Appendix (1974) for a summary of OMB's numerous other statutory duties.

[26] 31 U.S.C. § 16, note 25, *supra*, amended by P.L. 93-250, § 1 (Mar. 2, 1974).

[27] This would include, *e.g.*, the ICC, *see SCRAP II*, *supra*, 422 U.S. at 320-21, 322-27; and the SEC, *see* Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D.D.C. 1974); Civ. No. 409-73 (D.D.C. May 19, 1977), C.C.H. Fed. Sec. L. Rep. ¶ 96,057 (June 2, 1977).

principle of *reductio ad absurdum* is part of the landscape of logic. Plaintiffs have not suggested a limiting principle to their logic.

Plaintiffs have put forward as an alternative an escape hatch that would limit the EIS requirement to instances of an alleged cutback in some aspect of NWRS activity, as in the level of NWRS staffing and maintenance, leveling of total expenditure, and lack of acquisition of new refuges.

The difficulty of limitation still obtains. Every agency has limited resources and has to establish priorities among its programs and activities within a program. Some areas and functions are given new emphasis, others are reduced. Some of these decisions, such as a decision to decline to expand the National Park System, may be of great environmental significance. In general, however, if there is no proposal to change the status quo, there is in our view no "proposal for legislation" or "other major Federal action" to trigger the duty under NEPA to prepare an EIS.

It would be absurd to require an EIS on every decision on the management of federal land, such as fluctuation in the number of forest fire spotters. We know of no case pushing NEPA to such extremes. The cases cited on this point by the plaintiffs involve initiation or construction of a new project, or a sale of federal resources.[28] The cases requiring an EIS in connection with appropriations

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[28] *E.g.*, National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973) (exchange of national forest land for private land); Minnesota Public Interest Research Group v. Butz, 358 F. Supp. 584 (D.Minn. 1973) *aff'd* 498 F.2d 1314 (8th Cir. 1974) (en banc) (timber sales in Boundary Waters Canoe Area), 541 F.2d 1292 (8th Cir. 1976) (en banc); Businessmen Affected Severely By the Yearly Action Plans v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972) (rezoning tract to permit construction of commercial building).

requests involve proposals for construction or development of a project.[29] There is a danger of overburdening NEPA by spreading its mandate too widely. The environmental analysis required by NEPA is governed by the rule of reason, as we have held in determining the scope of real-

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[29] The leading case for the proposition that an appropriation request is a "proposal for legislation" under NEPA, Environmental Defense Fund v. TVA [Tellico Dam], 468 F.2d 1164, 1181 (6th Cir. 1972), involved the construction of a dam and reservoir. *Accord*, Realty Income Trust v. Eckerd, No. 76-1062 (D.C. Cir. June 29, 1977) (congressional committees' approval of construction of a federal building); Atchison, Topeka, and Santa Fe Ry. v. Callaway, Civ. No. 74-1190 (D.D.C. May 2, 1977) (construction of dam and locks).

An EIS was required for the program to develop a liquid metal fast breeder reactor (LMFBR) in Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973). NEPA was held applicable to the LMFBR program on the basis of "a 'proposal for legislation' each year, in the form of appropriations requests by the [Atomic Energy] Commission." *Id.* at 404, 481 F.2d at 1088. The LMFBR program involved the development of a new energy technology and the expenditure of R & D funds which would partially determine the energy alternatives later available to the nation.

Kleppe v. Sierra Club, 427 U.S. 390 (1976) does not preclude the applicability of NEPA in this case. Its holding that no EIS was required was based on the finding that there was no program to analyze.

> But there is no evidence in the record of an action or a proposal for an action of regional scope.
>
> * * * *
>
> In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.

Id. at 400-01. Here, there clearly is a program—the Refuge System, which the FWS treats as a program and on which it has prepared a programmatic EIS.

istic alternatives to the proposed action[30] and the intensity of the required analysis.[31] A rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA. In our view, section 102(2)(C) contemplates a "proposal" for taking new action which significantly changes the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program.

We hasten to add the qualification that NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. The need is for a reading of NEPA that harmonizes its words, its purposes, and the rule of reason. Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review. A review of such a nature reflects choices that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives.[32]

We have no occasion at this time to consider whether, or in what instances, a "new look" may be required be-

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[30] Natural Resources Defense Council v. Morton [Outer Continental Shelf Leasing], 148 U.S.App.D.C. 5, 12, 15, 458 F.2d 827, 834, 837 (1972) (cited with approval in Vermont Yankee Nuclear Power Corp. v. NRDC, 46 LW 4301, 4309 (S.C. Apr. 3, 1978).

[31] Scientists' Institute for Public Information v. AEC, 156 U.S.App.D.C. 395, 408, 481 F.2d 1079, 1092 (1973).

[32] Such an appropriations request may have no more significant effect on the environment than the previous year's routine request (possibly in the same amount), but the change in context makes it a determinative and meaningful proposal for legislation.

cause of vastly changed circumstances, either by NEPA or perhaps by some other provision of federal law. Nor need we now consider whether a court may mandate any such duty to take a new look.

What we do hold is that an EIS is required when such a new look is had. A new look may be generated periodically and spontaneously as a matter of good management and revitalization of the bureaucracy. It may be a response to external stimulus, as when dramatically changed circumstances cry out for review, or perhaps to accommodate existing programs to changes in the agency's statutory mandate. It is clear that there is wide discretion in the agency to determine when such review will be conducted. That is the essence of government and administration. It is impossible to have a "new look" at everything all the time. When there is such a new look the ensuing request for appropriations is a "proposal for legislation" under NEPA.

We need not decide whether this kind of painstaking reappraisal of the NWRS was required at the time plaintiffs brought this lawsuit, because the FWS has since undertaken one. The Programmatic EIS evaluates the environmental consequences of the proposed operation of the NWRS and alternatives thereto over the next decade. The FWS has indicated that it intends to make an analysis from scratch at the end of those ten years; in the meantime, it will update the environmental study in light of changed plans and circumstances.[33]

The Programmatic EIS sets forth the environmental consequences of the FWS's present plan to operate the NWRS at a roughly constant real level of expenditure

[33] The principle of an agency's borrowing existing environmental analysis from available sources, Natural Resources Defense Council v. Morton, *supra* n.30, at 15, 458 F.2d at 837, applies equally to a borrowing from an agency's own prior analyses.

with priority given to its conservation mission over public use—recreational and educational. It also considers the effects of alternate program priorities and expenditures. The adequacy of the EIS for what it is (a long-term strategy and analysis) has not been challenged by plaintiffs on appeal. The controversy presented to this court concerns the district court's ruling that an EIS is required in the future for each and every annual budget request. We hold to the contrary.

C. *OMB's Obligation*

NEPA requires all agencies of the federal government to:

> identify and develop methods and procedures, in consultation with [CEQ], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration along with economic and technical considerations.[34]

This requirement is applicable to OMB as the agency responsible for preparation of the budget and other executive legislative proposals, a conclusion drawn from the Act itself and supported by the legislative history and administrative regulations.[35] Our view that some but not

[34] Section 102(2)(B), 42 U.S.C. § 4332(2)(B).

[35] *See* text at note 25, *supra*. The legislative history of NEPA indicates that Senator Jackson, the prime mover of NEPA, anticipated that OMB would play a large role in coordinating agency compliance with NEPA. *National Environmental Policy: Hearing on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116-17 (1969).

OMB's role is also identified in the CEQ Guidelines. CEQ's central role with regard to NEPA generally appears from Executive Order 11514, note 8, *supra*. The CEQ Guidelines issued pursuant to that Executive Order envision an OMB role in enforcing NEPA's "proposals for legislation" branch in this provision:

[Continued]

all (and certainly not routine) requests for appropriation are "proposals for legislation" under § 102(2)(C) underscores a need, on the part of agencies, for guidance in determining when an EIS is required in connection with a budget request.

These observations clarify the obligation imposed by NEPA and OMB, as the key agency in the executive's budget formulation process, to give appropriate guidance to the agencies. The district court granted declaratory relief that NEPA requires:

> Defendant Director of the Office of Management and Budget to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.[36]

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[35] [Continued]

> [CEQ] and [OMB] will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance. Agencies should prepare impact statements prior to submission of their legislative proposals to [OMB]. In this regard, agencies should identify types of repetitive legislation requiring environmental statements (such as certain types of bills affecting transportation policy or annual construct authorizations).

40 C.F.R. § 1500.12(a).

Apart from the CEQ regulation, we find a specific duty in NEPA's requirement to "identify and develop methods and procedures," 42 U.S.C. § 4332(2)(B). In our view, this provision obligates OMB, in its core role as manager of the budget process, to promulgate guidelines to identify those budget or other appropriations proposals which are subject to the requirements of section 102(2)(C), 42 U.S.C. § 4332(2)(C), as "proposals for legislation."

[36] Sierra Club v. Morton [National Wildlife Refuge System], Civ. No. 74-1017, Order at 1 (D.D.C. June 6, 1975), J.A. 92.

The parties have not focused on this aspect of the district court's ruling and we might treat it as not appealed. However, the government defendants might argue that it was implicitly subject to further consideration in the light of their main contention. And the rulings we have made on the type of budget and appropriation requests that require an EIS will obviously affect the obligation put on OMB. To avoid uncertainty, we have considered the matter and affirm the ruling that requires OMB to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process when it culminates in proposals for legislation under the principles previously discussed.

This is not an onerous task. Preparation of the Budget is OMB's central function in helping the President coordinate the policy of the agencies and establish priorities for his administration. As it stands, the declaratory judgment imposes a duty on OMB to initiate the delineation of the procedures required by NEPA in connection with the budget process.[37] This task will be eased and simplified, we anticipate, by our rulings identifying what types of requests to the legislature for appropriations do and do not require preparation of an EIS, as well as

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[37] Since this issue has not been focused in this case, we have not researched OMB's formal or informal directives to the agencies for NEPA compliance, particularly in connection with their appropriations and other legislative proposals. *See* F. Anderson, *The National Environmental Policy Act*, in Federal Environmental Law 331-35 (E. Dolgin & T. Guilbert eds. 1974); W. Rodgers, Environmental Law, 705, 714 (1977). OMB may already have some guiding regulations in this area as a foundation for the required procedures and methods. In any event, the declaratory judgment obliges OMB to look at its procedures and methods for assuring inclusion of environmental values in the budget process and to revise them if necessary to conform to its views of what NEPA requires, consistently with this opinion.

clarifying the bounds of an agency's discretion in undertaking a reevaluation of an ongoing program.

OMB will give consideration to how obligations under NEPA can be discharged without violating the principle that holds an agency's budget requests confidential prior to final review by the President. We do not expand on the problem here. For one thing, it was not developed by the government's appeal. Furthermore, we anticipate that the OMB will wish to ponder the matter afresh in light of the rulings in this opinion. The matter may be capable of resolution in a manner that presents program proposals in terms that permit an environmental analysis, without disclosure of dollar projections or other betrayal of genuine budget confidence. Since requirement of an environmental impact statement in connection with budget proposals will arise in relatively few instances, under the principles we have set forth, and since proposals for major program reviews and changes can probably be disclosed in general outline, sufficient for impact statement purposes, without undercutting the objectives underlying budget-type secrecy, OMB can fairly be called on to develop a proposal that serves and harmonizes both NEPA and budget processes. Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the executive official or agency.

IV. Conclusion

NEPA has been salutary in heightening agency attention to environmental values, in part by requiring disclosure of environmental consequences. However, we cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous

extremes. NEPA does not require an annual,EIS on routine operation and maintenance of every program with significance environmental ramifications. Its rule of reason does not demand rethinking of everything all the time.

The Fish and Wildlife Service has undertaken a reevaluation of the National Wildlife Refuge System, and has done an analysis of its long term plan for operation of the System. We are not presented with a challenge to the validity of that exercise of discretion. In view of the programmatic EIS it has prepared there is no further obligation under NEPA at this time.

The judgment obligating defendants to prepare an annual EIS on NWRS operations is reversed. We affirm the judgment declaring OMB's duty to develop methods and procedures to implement the NEPA obligation to provide environmental impact statements to accompany those proposals on budget and appropriations that are proposals for legislation. This duty, as set forth in this opinion, applies when the request for budget approval and appropriations is one that proposes a considered programmatic course following a programmatic review. OMB will have latitude to propose a method that harmonizes both NEPA and budget processes.

The case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: I concur in the foregoing opinion insofar as it reverses the declaration of the district court requiring defendants to prepare an Environmental impact Statement (EIS) with each annual request for appropriations to operate the National Wildlife Refuge System (NWRS). In my opinion such requirement would be wholly unreasonable in that it would result in an interpretation of the NEPA never intended by Congress. The court's rejection of the Sierra Club's position has my concurrence, but because the opinion has attempted to rely on a flexible "rule of reason" approach, rather than heeding the straight-forward words of NEPA, its holding in my opinion does not go far enough in rejecting any EIS requirement for annual appropriation requests.

The court's opinion holds that a "rule of reason" must be applied limiting the language of the regulation. It bases this conclusion on the plain meaning of CEQ regulation 40 C.F.R. § 1500.5(a) which states that an "action" subject to the EIS requirement includes "recommendations or favorable reports relating to legislation *including requests for appropriations*" (emphasis added) and points out that if the contentions of appellee were upheld they would mandate the absurd result that all requests for appropriations would require EISs. The reasonable limitation so imposed is that routine requests for appropriations may be distinguished from intensive "new looks" at a program's budget, it being reasonable to require EISs of the latter but not of the former. Actually the only issue before us is the court's holding with respect to the annual appropriation request for the NWRS and so there is no necessity for any dictum as to the ultimate limits of the rule.

I agree that it would be unreasonable to require EISs for every major budget request. In addition to the unreasonableness of such construction of the statute, the

intent of Congress and the uniform precedents from generations of legislative procedings clearly indicate that Congress has never considered "requests for appropriations" to be either "proposals" or "proposals for legislation or major federal action." In my opinion the entire budget request process for the NWRS involved here is outside the EIS requirement of NEPA.

I

Standing

As a preliminary issue, I concur in that part of the court's opinion that directs the lower court on remand to consider the issue of whether or not the Sierra Club has standing. The lower court granted summary judgment for the appellees and in so doing must perforce have determined that they did have standing to bring this suit. The Sierra Club, however, submitted no affidavits indicating either that any of its members or its fellow appellees' members in fact used the Wildlife Reserves in question, or that their enjoyment of these areas would be in any way affected by the NWRS budget proposals. An organization which does not prove injury to itself or its members has no standing to challenge harm to the environment, *Sierra Club v. Morton*, 405 U.S. 727 (1972); Davis, *Administrative Law in the Seventies* § 22.19 (1976). Here the complaint of the Sierra Club alleges injury, but these allegations have been denied and are not supported by any evidence of record. Allegations on which standing is premised must be both "true and capable of proof at trial," *United States v. SCRAP*, 412 U.S. 669, 668-689 (1973) (SCRAP I). In this case, where plaintiff's standing allegations are controverted, and particularly in light of the summary disposition effected by the lower court, it is necessary that the facts upon which standing is premised be not only alleged but demonstrated, *Northern Great Plains Coal Case, Sierra Club v. Morton*, 514 F.2d 856, 869-870 n.20 (D.C. Cir. 1975),

rev'd on other grounds, 427 U.S. 390 (1976). In this record there is no evidence at all that appellees' allegations are "capable of proof." As the opinion of Judge Leventhal states, there seems little doubt that the Sierra Club can offer proof that some of its members make use of the Wildlife Refuges involved in this case, but appellees must offer proof of that fact, not merely allegations.

However, even though appellees do prove that some of their members use the Wildlife Refuges, they still must clear what is to my mind a much more difficult hurdle before they can be held to have demonstrated their standing. Appellants strenuously argue that there is no evidence that any of the budget requests submitted by the Department of the Interior and the OMB will result in the curtailment of any identifiable refuge or refuge activity. It may well be true that the staff reductions proposed will not in fact impair the quality of the Wildlife Reserves or their availability. Indeed, one affiant testified that such lands as wilderness areas are best managed by *not* being managed at all. This argument is not devoid of logic. Appellees must demonstrate that some denial of service to them, *i.e.*, the injury which allegedly gives them standing, "in fact results from" the challenged budget requests, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976); *see also Linda R. S. v. Richard D.*, 410 U.S. 614, 617-18 (1973); *King's County Economic Commercial Development Ass'n v. Hardin*, 476 F.2d 478 (9th Cir. 1973). The seemingly self-evident truth that a decline in funding will result in the decline of the quality of the service provided is overly facile when dealing with areas whose chief value in the environmental scheme lies in being preserved as nature would leave them. Moreover, unless appellees can demonstrate a causal connection between the proposed appropriation and some identifiable decline in one of its member's use of a wildlife refuge, the Sierra Club is in effect asking this court to litigate not as to a particular

injury, but, assuming any injury at all exists, as to a general injury suffered by the public at large, which courts may not be empowered to rectify, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 215-227 (1974). On remand, the District Court must consider and require proof concerning these questions relating to standing.[1]

II

Budget Requests as "Proposals"?

The appellees attempt to bring budget requests under the statutory language requiring EISs for "proposals for legislation or other major federal actions." Since it is my opinion that such requests are not "proposals," and even if "proposals," are not proposals for either legislation or major federal action, I find no merit whatsoever in the Sierra Club's argument.

Appropriation requests by departmental units cannot be considered "proposals" until they have achieved at least that degree of finality only attained when the President has formally determined to transmit the departmental request to Congress as part of his budget. *See Northern Great Plains Coal* Case, 427 U.S. 390

[1] Appellees also maintain that as an alternative to demonstrating customary "injury in fact" standing, they should be given standing because they were denied, by the NWRS and the OMB's failure to file EISs, "the information which would be provided by an environmental impact statement and the opportunity to comment on the statement and thereby to participate in the decisionmaking process." Brief for Appellees at 18. This novel theory of standing is, on the facts of this case, disposed of adversely to appellees' position by United States v. Richardson, 418 U.S. 166, 176-77 (1974) and The Mineral King Case, Sierra Club v. Morton, 405 U.S. 727, 736 (1972) with sufficient conclusiveness that it does not merit extended discussion here. It might be characterized as a claim that they had standing because they did not have access to facts that might have proved standing.

(1976) wherein the Supreme Court struck down a decision of the Court of Appeals which held that NEPA empowered a court to require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a proposal. 427 U.S. at 404. In finding such action outside the intent of the statute the Court stated:

> The statute clearly states when an impact statement is required [that is] under the first sentence of § 102 (2) (C) the moment at which an agency must have a final statement ready "is the time at which it makes a recommendation or report on a *proposal* for federal action." *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975) (SCRAP II) (emphasis in original).

427 U.S. at 405-406. And further:

> A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*

427 U.S. at 406 (emphasis in original).

It is clear that in the budget-making process there is no final proposal until the President includes the item in his budget to Congress. Not only are the suggestions made by OMB and the various agencies confidential until the President transmits them to Congress as part of his formal budget,[2] but moreover, the statutory and constitutional scheme governing the budget-making process make it clear that the task of submitting a proposed budget is solely a *presidential* responsibility.[3] It is not

[2] *See infra*, p. 19-22.

[3] *See* § 207 of the Budget and Accounting Act, 1921, 42 Stat. 22, 31 U.S.C. § 16, as amended by § 101 of Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

until the President himself has acted that any budget request has been *proposed*.[4] The requests for supply that are forwarded through the various agencies and the OMB for final presidential approval are purely pre-decisional and under the statute do not constitute proposals which require filing an EIS, *cf. Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320-21 (1975) (SCRAP II). To a certain extent, it would make as much sense to require cabinet ministers to submit EISs on suggestions made at confidential cabinet meetings as it would to require EISs of the OMB—merely a unit in the Executive Office of the President[5] in this case. NEPA was never intended to apply to incipient requests.

III

Budget Requests as "Proposals for Legislation"?

Even when the President has in fact transmitted his budget to Congress, assuming that such transmittal does indeed involve a "proposal," such proposals do not, to my mind constitute proposals for *legislation* or major federal action" within the intendment of Congress. NEPA provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

[4] For an analagous situation where recommendations apparently even more final than OMB and certainly than agency budget requests were (and continue to be) not deemed final until the President has approved them, *see* C & S Air Lines v. Waterman Corp., 333 103, 114 (1948), where CAB orders as to certificates for overseas or foreign air transportation were not "mature" or susceptible to judicial review until approved by the President.

[5] 31 U.S.C. § 16 (1970) provides: "There is in the Executive Office of the President an Office of Managament and Budget."

> (C) include in every recommendation or report on proposals for *legislation* and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes . . .

42 U.S.C. § 4332(2)(C) (emphasis added).

The appellees have consistently contended throughout this litigation that the *annual appropriation requests* to

finance the National Wildlife Refuge System are proposals by federal agencies (1) "for *legislation* or other major federal actions" significantly affecting the environment.[6] Appellees include in this phase of their argument the contention that an EIS is required whenever the NWRS in any given year (1) does not initiate a request, as they had in the past, for appropriations to purchase additional lands for refuge,"[7] and whenever (2) a request is submitted that involves a reduction or alteration of the use of appropriations.[8]

The rationale underlying these arguments, so far as the contention that these acts might constitute "legislation" is concerned, is that all functions of the agency have a vested right, which can be enforced by third parties, naturally and routinely to continue to receive the largest sums ever appropriated for a given purpose; and any change—even that of not continuing to expand the program by the purchase of *new* refuge areas at the same rate of increase as in the past—amounts to a change in the law, *i.e.*, to "legislation." In my view such

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[6] Plaintiffs [appellees] contend that these *annual* proposals to finance the National Wildlife Refuge System are proposals by federal agencies (1) for *legislation* significantly affecting the environment; and (2) for major federal action significantly affecting the environment. Consequently, plaintiffs submit, defendants are required by the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, to prepare, disseminate and consider statements concerning the environmental impacts of such proposals. Plaintiffs also claim that the Office of Management and Budget has failed to identify and develop the formal methods and procedures required by Section 102(2)(B) of NEPA and the Guidelines of the Council on Environmental Quality implementing the National Environmental Policy Act, 40 C.F.R. 1500.3.

Appellees' Brief, p. 3 (emphasis added).

[7] *Id.*, p. 30.

[8] *Id.*, pp. 29-34.

a contention is completely unsupportable either as legal doctrine or as an interpretation of congressional intent. Judge Leventhal has referred to the absurd consequences it would entail and I agree with that conclusion.

Apart from the patent absurdity of the result suggested by appellee, I also find their claim in this respect to be contrary to the meaning that Congress has traditionally intended when it refers to "legislation." This conclusion is supported by the precedents in Congress that evidence the distinction in the mind of Congress, as to what does and what does not constitute *legislation*.

Traditionally, Congress has distinguished between "legislation" and an "appropriation." The congressional practice in this respect is set forth in L. DESCHLER'S PROCEDURE (1974):

> § 7. An item contained in a general appropriation bill must be authorized by law. Statutory authority for the appropriation must exist. . . . 119 CONG. REC. p. ... , 93d Cong., 1st Sess., June 5, 1973 [H.R. 8619].

Id. p. 266 (emphasis added). It is the law *authorizing* appropriations that Congress refers to as "legislation," not the subsequently resulting appropriations. All appropriations must first be authorized by laws which emanate from the select committee having jurisdiction of that function of government, not from the Appropriations Committee. This distinction in meaning is pointedly set forth in the House Rule prohibiting the inclusion of *legislation* in appropriation bills:

> § 1.1 The prohibition against inclusion of legislation in general appropriation bills is provided for by House rule. It states: "Nor shall any provision in any such bill or amendment thereto *changing existing law* be in order, except such as being germane to

the subject matter of the bill shall retrench expenditures. . . ." (Clause 2 Rule XXI.)

§ 1.2 Language in an appropriation bill changing existing law is *legislation* and not in order. 105 CONG. REC. 12125, 86th Cong. 1st Sess., June 29, 1959 [H.R. 7978].

L. DESCHLER'S PROCEDURE, p. 295 (emphasis added).

While this rule is limited to general appropriation bills, the italicized passages clearly indicates that when Congress refers to "legislation" it means "changing existing law."

In the same vein, legislation is defined as "the function of making *rules* . . ." *Webster's Third New International Dictionary* 1291 (3d ed. 1961) (emphasis added). The supply of a sum of money is not the making of a rule. Thus congressional and common English usage make it clear that the furnishing of money for previously authorized purposes is not "*legislation.*" The congressional precedents that support this interpretation are legion. However some courts may have interpreted "legislation," [9] it is the intent of *Congress* that controls. And in

[9] *Cf.* Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972), where the court overlooked that the CEQ Guideline it relied upon referred to "*legislation* including that for appropriations," i.e., "legislation including *legislation* for appropriations," which would refer to *authorizations* for appropriations. 468 F.2d at 1181; Scientists' Institute for the Public Interest, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) contains the same approach. 481 F.2d at 1088. Neither of these cases take stock of the congressional intent evident in its use of the terms "legislation" and "appropriations" for more than a hundred years. This should not be lightly disregarded in favor of loose street language. After all, Congress does have some greater familiarity with "legislation" and "appropriations" than the average uninformed citizen. Environmental Defense Fund v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972).

my view when Congress in the Environmental Protection Act referred to "legislation," with respect to legislation in Congress, it intended thereby to convey the same meaning as Congress customarily gives to the term when used in its own proceedings.

The construction of the Act here in question is controlled by what Congress intended and here as elsewhere Congress distinguished between "legislation" and "appropriations." For example, Congress also very pointedly makes the same distinction in the criminal code between "legislation or appropriations," 18 U.S.C. § 1913.[10]

Congress also distinguishes between "legislation" and "appropriations" in 22 U.S.C. § 2394(c)

> . . . any committee of the Congress charged with considering *legislation*, *appropriations* or expenditures under this chapter, has delivered . . . (Emphasis added.)

In addition 42 U.S.C. § 2996e(c)(2)(B) refers to communications

[10] Lobbying with appropriated moneys—No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

18 U.S.C. § 1913 (emphasis added).

> in connection with *legislation or appropriations* directly affecting the activities of the Corporation. (Emphasis added.)

Some courts have also noted the distinction. Justice Harlan in *Barenblatt v. United States*, 360 U.S. 109 (1959) stated:

> Since Congress may only investigate into those areas in which it may potentially *legislate or appropriate*, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

360 U.S. at 111-12 (emphasis added).

This court in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) stated:

> Congressional control over *appropriations and legislation* is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation.

487 F.2d at 778 (emphasis added), quoting from Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 486 (1957).

In *Schneider v. Lansdale*, 191 Md. 317, 61 A.2d 671 (1948) the court noted that the circuit court had based its decision on the

> broad general proposition that the making of appropriations is a legislative function. The issue is much more narrow. It is whether the words "enact legislation" *as used in Article XIA, Sec. 3 of the Constitution* embrace every exercise of legislative power, in the broadest sense of that term, and specifically such matters as the making of budgets and the appropriation of money for county expenses . . . which may be, at least in part, legislative functions.

61 A.2d at 673-74. The court held that the phrase "enact legislation" in the Maryland Constitution did not encompass the making of budgets and the appropriation of money for county expenses.

The Supreme Court of Arizona has also ruled similarly. In a case where the State Auditor contended that a general appropriation bill unconstitutionally violated the provision of the state's constitution restricting each act to one subject, the court held:

> *The general appropriation bill is not in the true sense of the term "legislation"; it is, as the language implies, merely a setting apart of the funds necessary for the use and maintenance of the various departments of the state government already in existence and functioning.*

Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666, 669 (1933) (emphasis added). The court continued at 24 P.2d 670:

> If an act which makes appropriations to the various departments of the state contains, *in addition to appropriations, legislation* of such a nature that its subject must be expressed in the title, this alone would immediately suggest that such legislation could not stand. (Emphasis added.)

The court sustained the auditor's position and denied the writ. This distinction between appropriations and legislation was also recognized in *Carr v. Frohmiller*, 47 Ariz. 430, 56 P.2d 644 (1938), but a different result ensued because the bill did not contain more than one subject. This same distinction has been universally recognized by the parliamentary decisions in Congress.

All precedents in Congress, which in this respect go back as far as 1842, 4 HINDS' PRECEDENTS § 3811 (1907) (hereafter "Hinds' "), make a distinction between "legislation" and the "appropriation" of money by Congress and prohibit the *change* of any existing laws (legislation) in

any general appropriation bill. 4 HINDS' § 381 (1907), §§ 3812, 3813. The enactment of positive law where none exists is construed as "changing existing law" within the rule. *Id.*, §§ 3812, 3813, and thus although the initial legislation *authorizing* a program in need of supply may be "legislation," subsequent appropriations are not. For the lengthy list of congressional precedents involving decisions as to what constitutes legislation, *see* 9 CANNON'S PRECEDENTS, Index, pp. 190-91 (72) (hereafter "Cannon's").

Further support for the position that the intent of Congress was, and is, that "legislation" be restricted to those instances where there has been a "change of law" is found in the doctrine that limitations upon appropriations are not considered to constitute legislation. 7 CANNON'S § 1710. Thus, for example, an amendment that proposes to defer disbursements from an appropriation until a departmental regulation has been enforced does not constitute "legislation," as it is a limitation on an appropriation bill. *Id.*, § 1581. Even when significant interests and policies are affected by such limitations they are still not considered to be "legislation". For instance, HINDS' in § 3987 reports a ruling that it was in order, by a limitation on an appropriation bill, to withhold the appropriations from a designated object even though a *contractual obligation* of the United States for ocean mail service between the United States and foreign ports may thereby be left unsatisfied. It has also been ruled that a provision in an appropriation bill providing that no sums thereby appropriated for that year may be expended for a reformatory within a radius of ten miles of Mt. Vernon, except the one then located at Occoquan, Virginia, merely amounted to a limitation and was in order in an appropriation bill. 7 CANNON'S § 1710 (1935). None of these limitations changed the law, *i.e.*, the statute authorizing the appropriation, hence they were not "legislation."

With respect to appellants' claim that a reduction in an appropriation from one year to another constitutes "legislation," there are a number of precedential decisions in Congress specifically holding to the contrary. It has been ruled that action by the House cutting down an appropriation below the amount authorized by law is not considered to be legislation. That decision was made by Congressman Tilson of Connecticut who in ruling stated:

> "The reason for that rule of limitation is simply this: The House in Committee of the Whole has the right to refuse to appropriate for any object which it may deem improper, although the object may be authorized by law; and it has been contended, and on various occasions sustained by the Committee of the Whole, that if the committee has the right to refuse to appropriate anything for a particular purpose authorized by law it can appropriate for only a part of that purpose and prohibit the use of the money for the rest of the purpose authorized by law. That principle of limitation has been sustained so repeatedly that it may be regarded as a part of the parliamentary law of the Committee of the Whole."

7 CANNON'S § 1710 (1935). The foregoing ruling relied upon a prior ruling by Congressman Dingley of Maine reported at 4 HINDS' § 3936, p. 632 (1907). Thus, retrenchment is not a change of existing law, *i.e.*, it is not "legislation" as Congress uses that term.

Important restrictions on the expenditure of appropriated funds may be embodied in an appropriation bill without enacting "legislation." In considering a bill for the appropriation of funds for the Commission of Fine Arts which provided that no part of such sums shall be expended for traveling expenses, other than those incurred by members of the Commission for actual travel only going to and returning from Washington to attend meetings of the Commission, it was ruled that such provision did not constitute legislation. While the provision

would prohibit the use of funds for a purpose authorized by law it was nevertheless construed to be a proper limitation and not legislation. The reasoning underlying this ruling is that a provision refusing to continue appropriations to the maximum extent authorized by law, and for the maximum purposes authorized by law, does not amount of legislation. CANNON'S § 1656.

During the Sixty-Eighth Congress, existing law provided that investigations could be conducted upon the request of either House, or upon a concurrent resolution of both Houses. An amendment to an appropriation bill offered by Congressman Newton of Minnesota proposed that "no part of the appropriation . . . shall be expended for investigations . . . except those authorized and directed by the concurrent resolution of both Houses." The Chair upheld such limitation in ruling "that Congress may appropriate for one object authorized by law and refuse to appropriate for another object authorized by law," *i.e.*, without such selective appropriation being considered by Congress to constitute legislation. CANNON'S § 1595.

The rule prohibiting legislation in appropriation bills is also construed strictly in favor of the point of order. CANNON'S § 1707. This permits any single Congressman easily to enforce the rule merely by raising a point of order.

This long history, indicating that Congress, in its uniform practices, does not consider that the appropriation of money constitutes "legislation," convinces me that when it referred to "legislation" in the Environmental Protection Act it did not intend "legislation" to include requests for *authorized* appropriations, when the sums requested do not exceed or vary from the amount Congress has fixed in its *statutory authorization*. It is also evident that the foregoing precedents demonstrate that Congress did not intend to include the rise and fall of

annual appropriations for authorized purposes, and within authorized limits, as being within the ambit of "legislation."

While appellees cite the Guidelines of the Council on Environmental Quality, 38 FED. REG. 20550, 40 C.F.R. § 1500 *et seq.*, as expert opinion that Congress in NEPA intended to include budget requests within the scope of the EIS requirement applicable to "proposals for legislation . . . or major federal action," it is my view that the language of these Guidelines is not inconsistent with interpreting the EIS requirement to apply only to legislation *authorizing* appropriations, *i.e.*, to alterations in the existing law, not merely annual budget requests.[11]

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[11] Appellees cited the following:

1500.2. *Policy*

(a) As early as possible and in all cases prior to agency decision concerning recommendations or favorable reports on proposals for (1) legislation significantly affecting the quality of the human environment * * * (hereafter "legislative actions") and (2) all other major Federal actions * * * Federal agencies will, in consultation with other appropriate Federal, State, and local agencies and the public assess in detail the potential environmental impact.

* * *

1500.5 *Types of Actions covered by the Act*

(a) "Actions" include but are not limited to:

(1) Recommendations of favorable reports relating to legislation *including requests for appropriations.*

* * *

1500.12 *Legislative Actions*

(a) * * * *Agencies should prepare impact statements prior to submission of their legislative proposals to the Office of Management and Budget.* In this regard, agencies should identify types of repetitive legislation requiring environmental impact statements (such as cer-

This conclusion can be reached by comparing the Guidelines' use of "proposals for legislation" and their reference to "authorizations." In any event, the CEQ Guidelines were obviously basing the regulations on the terminology of the statute and—for the reasons hereinbefore outlined—this language does not equate requests for *appropriations* with proposals for *legislation.*

IV

Budget Requests as Proposals for Major Federal Action?

Appellees need not persuade that budget requests are "proposals for legislation" in order successfully to contend that such requests should be subject to the EIS requirement, if it can demonstrate that these requests should be considered as "proposals for major federal action." Common sense, however, mandates giving short shrift to this leg of appellees' argument. The NWRS in this case has not proposed any change in budget appropriations, but rather has merely initiated a routine, continuing request for funding. When such requests are made for the first time, thus commencing a new program, or conversely where a decision is made to request no funding at all, thus terminating a program, perhaps such action could plausibly be considered "major"; but I cannot agree that a routine, annual budget request within the existing legislative authorization, differing in no major degree from those submitted in the past, can credibly be deemed "a proposal for major federal action." Congress would never consider such action as "major," and it is the intendment of Congress that is controlling. The continua-

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tain types of bills affecting transportation policy or annual construction authorizations.)

Appellees' Brief, p. 22 (emphasis in brief except emphasis on "authorizations" added). The reference to "authorizations" is significant.

tion of annual funding—naturally reflecting, in the size of the request, the vicissitudes of economics and elections —works no change in the law. Far from being an example of "major federal action," it might more properly be considered the result of "federal inertia." As has been shown above in refuting the argument that a budget request is a proposal for legislation, supply has traditionally not been deemed to involve a change in the law. Although the CEQ's regulation, 40 C.F.R. § 1500.5 (a), stating that "action" includes "requests for appropriations" is entitled to considerable deference, I find no indication whatsoever that Congress meant to elevate normal annual supply concerns to the dignity of "proposals for . . . major federal actions." Accordingly, I disagree with the Council's interpretation of the scope of such term and find EIS requirements inapplicable to the annual budget requests of the NWRS which are the subject of this appeal.

V

Requiring an EIS on the Budget Requests and the Traditional Confidentiality of Such Requests

41 U.S.C. § 24 provides that "requests for . . . appropriations which are submitted to the Office of Management and Budget by the head of any department or establishment shall be prepared and submitted *as the President may determine* in accordance with the provisions of section 11 of this title . . ." This generally calls for various agencies submitting their requests to the President through the OMB. The President reviews all these requests, makes his own decision thereon and then consolidates them in the form of an annual budget which he transmits to Congress. In this connection, pursuant to the authority conferred upon him by the statute that such requests "be prepared and submitted *as the President may determine,*" (emphasis added) (*Id.*), the President has determined, *inter alia*:

> 3. *Restrictions on disclosure of agency estimates.* All budget estimates and supporting materials submitted to the Bureau of the Budget are privileged communications. Their confidential nature must be maintained, since they are the basic data and worksheets in the process by which the President resolves budget problems and arrives at conclusions with respect to his recommendations to the Congress. The head of each agency is responsible for preventing disclosure of information contained in such estimates and materials except on request in formal appropriation hearings and when requested by Members of the Congress in connection with their consideration of the budget after its transmittal.

Circular A-10, revised Jan. 18, 1964, Executive Office of the President, Bureau of the Budget, App. 225. The confidential status of such requests is a matter of long standing dating at least from the 1930's, App. 242, 243, and even after the President has considered budget requests from the various agencies and decided upon the budget he will submit to Congress, the nature and amounts of the appropriations he has determined to request are confidential and are not publicly released until the budget is actually transmitted to Congress. App. 231.

This confidentiality of budget requests until they are formally submitted to Congress by the President is irreconciliable with the appellees' position that these requests should be the subject of Environmental Impact Statements. Congress has been aware of the confidential nature of budget requests, and despite extensive recent legislation concerning the budget process [12] has at no

[12] Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11, amended § 207 of the Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20. The House Committee on Pub. L. No. 93-250 commented "the rest of section 207 deals with the functions of the Office [of Management and Budget], which were transferred to the President by Reorganization

time explicitly suggested that EISs should be filed covering such requests. Perhaps even more significantly, Congress when it so intended has specifically removed the confidentiality of the budget requests submitted by certain agencies. The Consumer Product Safety Commission and the Commodity Futures Trading Commission [13] are examples of agencies whose budget requests have lost the protection of confidentiality. Congress, however, refrained from taking such legislative action with respect to either the Department of the Interior or the OMB.

Moreover, the amendments Congress enacted to the Freedom of Information Act,[14] evince no intent to alter the confidential nature of the communications between the President and units within the Executive Office. The conference report on the 1974 amendments to the FOIA explicitly stated that the term "Executive Office of the President," from which disclosure could be required under the Act, "is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." It is quite true that, by statute, the OMB gives advice to the Congress as well as to the President,[15] so some of its activities would fall outside of the above

Plan No. 2 of 1970 and *which are not changed by the bill.*" H.R. No. 93-697, 1974 U.S. CODE CONG. & AD. NEWS 2779 (emphasis added).

[13] Consumer Products Safety Act, § 27(k)(1), 86 Stat. 1227, 15 U.S.C. § 2076(k)(1) (Supp. V, 1975); The Commodity Futures Trading Commission Act of 1974, § 101(3), 88 Stat. 1390-1391, & U.S.C. § 7(a) (Supp. V, 1975).

[14] 5 U.S.C. § 552(b)(3) and (5) (Supp. V, 1975) provide exemptions from disclosure for information "specifically exempted from disclosure by statute" and "certain inter-agency or intra-agency memorandums or letters," respectively.

[15] 31 U.S.C. § 20 (1970) provides that the OMB shall provide any appropriate committee of either house "such aid and information as it may request."

proviso in the conference committee report, but to the extent that "units" exist within OMB "whose sole function is to advise and assist the President," such activities could be within the proviso. In this connection, 5 C.F.R. § 1303.20(b) states that certain units of the OMB do indeed "solely advise and assist the President" and that among these units are those that provide advice and assistance with regard to "the formulation and preparation of the Federal budget." This regulation is entitled to deference.[16] In light of the compelling evidence referred to above that Congress intended budget requests to remain confidential, I would not require an EIS to be submitted with the annual budget request of the NWRS.

VI

OMB and NEPA Obligations

In considering whether the Office of Management and Budget is "required to develop procedures to fulfill its [alleged] NEPA obligations in connection with the Budget process" concerning the National Wildlife Refuge Service, it is my view that the present regulations of the Department of the Interior and its "procedures" [17] ade-

[16] Udall v. Tallman, 380 U.S. 1, 16 (1965).

[17] Section 516.4 of the Department of Interior Manual provides:

Responsibilities

A. The Assistant Secretary [of the Department of the Interior]—Program Policy * * *.

(4) Shall review and approve all bureau and office procedures for the preparation and utilization of environmental statements.

[SEC. 516.5] *Determination of major Federal actions requiring environmental statements.*

The following criteria are to be used in deciding whether a proposed action requires the preparation of an environmental statement:

[Continued]

quately comply with the requirements in that respect and therefore I dissent from the majority's holding that the OMB is required to take the action it commands.

Conclusion

In summary, I concur in the holding that the District Court committed error in rendering its declaratory rul-

[17] [Continued]

A. Types of Federal actions to be considered include, but are not limited to:

(1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations.

Appellants' Brief 10-11.

The "Procedures for Preparation of 102(2)(C) Environmental Statements" which were distributed on November 8, 1974, by the Director of the Fish and Wildlife Service, Department of the Interior, "to be used Service-wide for the preparation of environmental statements" provide:

3.1 *Statements on Individual Actions.* * * * it is the responsibility of the Regional Director to determine whether an environmental statement is necessary for individual actions * * *.

3.2 *General (Generic or "Blanket")* Statements. * * * it is the responsibility of the Associate Director Research and Environment to determine whether a general environmental statement should be prepared for a service program or program element * * *.

* * * *

4.0 *Scope and Procedures*: NEPA directs Federal agencies * * * to include a detailed statement of environmental impacts in every recommendation or favorable report on, legislation or other major actions significantly affecting the quality of the human environment * * *.

* * * *

4.5 *Statements on Individual Actions.* Individual statements shall be prepared for individual actions which have significant impacts on the quality of the human environment, and which are not adequately covered in a general

ing that each annual budget request for the National Wildlife Refuge Service must be accompanied by an Environmental Impact Statement, but I disagree with this court's conclusion that the Secretary of the Interior is under any legal obligation to prepare a programmatic environmental statement on the NWRS program. As the court's opinion points out, it would be absurd to construe the Environmental Protection Act and its implementing regulations to require an EIS with each annual budget request. In my view it is even more absurd—and equally contrary to the language of the statute—to construe the law and the regulation as requiring that the Agency is under any "obligation" to produce the half-way measure of a "programmatic" environmental statement. For the reasons set forth above, I do not feel that an EIS is ever required at the clearly pre-decisional stage at which the OMB or an agency submits a mere appropriation request which has yet to be formally incorporated into the budget transmitted to Congress by the President. I thus conclude that the OMB is not required to establish any new procedures in order to comply with NEPA.

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statement. Examples of actions on which statements should usually be prepared include but are not limited to:

1. Legislation (See Section 4.6)

* * * *

4.6.1 *Administration Bills.* On draft *legislation* prepared by the Service an environmental impact statement will be prepared.

Appellants' Brief 1-12 (emphasis added). The record also indicates:

> . . . OMB also provides that during the legislative clearing process (when OMB solicits the opinions of one agency's *substantive legislative proposals* from other agencies) agencies must submit relevant and available EISs. (OMB Circular A-19, revised July 31, 1972, paragraph 7(d)(2) (App. 249) (App. 239-240). (Emphasis added.)

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1017

SIERRA CLUB, *et al.*, PLAINTIFFS,

v.

ROGERS C. B. MORTON, *et al.*, DEFENDANTS.

[Filed Jun. 6, 1975, James E. Davey, Clerk]

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment. Plaintiffs claim that annual budget proposals for financing the National Wildlife Refuge System involve a "recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment . . ." under Section 102(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(c), and that the defendants are therefore required to issue a detailed statement on the environmental impact of such annual budget proposals. Defendants seek dismissal of the action on several grounds. The matter has been thoroughly briefed by both sides.

All the cases that have considered this precise issue, as well as the Council of Environmental Quality's regulations, hold that appropriation requests are

"proposals for legislation" within the meaning of NEPA.

In *Environmental Defense Fund* v. *T.V.A.*, 468 F.2d 1164, 1181 (6th Cir. 1972), the Court stated that the phrase "proposals for legislation" as used in NEPA embraces annual appropriations requests: "The same results obtain if we construe the phrase 'proposals for legislation' in Section 102(2)(c) as did the District Court to encompass annual appropriation requests. Under 31 U.S.C. 22, the head of each federal agency must prepare each year a request for regular, supplemental, or deficiency appropriations to be submitted to Congress by the President under 31 U.S.C. 11. Unquestionably, to construe these budgetary requests as proposals for legislation within the meaning of NEPA would facilitate Congress' expressed purpose of constant revision and reevaluation of ongoing projects." See also, *Scientists' Inst. for Pub. Info. Inc.* v. *Atomic Energy Com'n*, 481 F.2d 1079 (D.D.C. 1973); *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn. 1972); *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289 (S.D. Texas 1973).

Further, the Council on Environmental Quality (C.E.Q.), the agency established by NEPA to serve as a research and advisory body to the President, has published guidelines that track the statute and support plaintiffs' position. The Council's regulations provide for the preparation of an impact statement whenever an action is determined to be a major action significantly affecting the quality of the human

environment. 38 Fed. Reg. 20550 (1973), 40 C.F.R. 1500 *et seq.* "Actions" are interpreted to include "recommendations or favorable reports relating to legislation *including requests for appropriations.*" (emphasis added). 40 C.F.R. 1500.5. The C.E.Q. Guidelines are entitled to great weight, and constitute a persuasive interpretation of NEPA. *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972). Moreover, the Department of Interior's regulations follow the C.E.Q. Guidelines by providing that impact statements should be prepared in connection with appropriation proposals. 36 Fed. Reg. 19342. Section 516.2.5.A provides:

> "A. Types of federal actions to be considered include, but are not limited to:
>
> (1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations."

The Court therefore concludes that annual proposals for financing the National Wildlife Refuge System are proposals for legislation within NEPA.

The Court is also of the opinion that annual proposals for financing the Refuge System are major Federal actions which clearly have a significant effect on the environment. The statutory phrase "actions significantly affecting the quality of the environment" has been held to be "intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make

the quality of the environment a concern of every federal agency." *Natural Resources Defense Council, Inc.* v. *Morton*, C.A. No. 1983-73 (D.D.C. Dec. 30, 1974, J. Flannery). Taking into account the nature and size of the Refuge System (350 refuges containing about 30 million acres), and the amount of the Refuge System's budget (about $200 million annually), it is evident that the scope of such budget project is far broader in terms of environmental impact than that of other proposed federal actions discussed in impact statements, such as a single canal, *Environmental Defense Fund* v. *Corps of Engineers*, 2 ERC 1173 (D.D.C. 1971), or dam, *Environmental Defense Fund* v. *Corps of Eng. of U.S. Army*, 325 F. Supp. 749 (E.D. Ark. 1971).

It goes without saying that budget decisions have a direct bearing on how the Refuge System will be staffed, managed and maintained. We think it equally clear that when the important interrelationship between the Refuge System and the budget process is considered, the unmistakable conclusion is that both the environmental impact of budget decisions is significant and that the federal action involved is major.

Defendants would counter the thrust of the clear language of the statute and the cited decisions with a variety of contentions. We now deal with certain of them.

Defendants argue that it would be impractical, if not impossible, and administratively burdensome to prepare impact statements at the budget proposal stage. Defendants assert that final budget decisions

are made less than one month before the President submits his budget recommendations in December prior to the commencement of the new fiscal year in July and that most budget decisions are not undertaken until September. Thus, defendants contend, the budget of the Department of the Interior is developed in a very short time frame, i.e., about four months.

Several courts, in considering and rejecting administrative difficulty as a defense under NEPA, have emphasized that NEPA requires compliance to the fullest extent possible. In *Calvert Cliffs' Coord. Com.* v. *U.S. A.E. Com'n.*, 449 F.2d 1109 (D.D.C. 1971), the defendants argued that compliance with the Act would place an enormous burden on the agency. The Court noted that ". . . the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." (p. 1115) See also *Environmental Defense Fund* v. *T.V.A.*, 468 F.2d 1164 (6th Cir. 1972).

Nor does the Court believe that compliance with NEPA is impossible. Defendants would convey the mistaken impression that appropriation proposals are emergency measures taken in response to some unforeseen event. Yet, defendants know that they are required to submit an annual appropriation proposal to Congress. Defendants, in fact, concede that the budget process begins about twenty months before

the beginning of the fiscal year and some fifteen months before the budget proposal is submitted to Congress. There is thus no reason to delay preparation of the impact statement until September or December of each year when final budget decisions are made. If no final, definite budget is in existence prior to that time, defendants should, to the fullest extent possible, prepare an impact statement that considers the various alternatives available at that time.

The Court's conclusion that defendants need not wait until final budget decisions have been reached before preparing an impact statement also finds support in the case law. The courts are in agreement that "federal action" within NEPA covers "proposals" as well as final decisions. The concept of NEPA is that officials give thought to the consequences on the environment *before* a significant project is launched. Therefore, what is assessed is "proposed action, not a fait accompli." *City of Boston* v. *Volpe*, 464 F.2d 254 (1st Cir. 1972). Moreover, the courts have repeatedly held that an impact statement should be prepared at as early a stage as possible in the development of a proposal to ensure compliance with the Act. *Calvert Cliffs' Coord. Com.* v. *U.S. A.E. Com'n, supra.* For the foregoing reasons the Court is of the opinion that it is irrelevant that final budget decisions are presently made in a very short time frame. NEPA requires defendants to draft an impact statement as early as possible and in time to accompany "proposals" through the agency review process.

Nor does the Court believe that under the rationale of plaintiffs' argument "hundreds or thousands of annual environmental impact statements would have to be prepared . . ." (Defendants' Reply Memorandum, p. 23). NEPA only requires that impact statements be prepared on those legislative proposals and federal actions significantly affecting the environment. Appropriation proposals for most federal agencies would not appear to pose a threat to the environment and therefore no impact statement would be required. In any event, even as to those agencies whose operations do significantly affect the environment, only one impact statement is required for the appropriations proposal. When it is noted that the Department of Transportation prepared 196 impact statements in just the first six months of 1974, C.E.Q., Fifth Annual Report, p. 390 (1974), it is difficult to accept the contention that the cumulative impact of today's decision will impose an insurmountable burden.

Defendants also argue that the budget process is privileged until the President adopts the budget and presents it to the Congress. OMB Circular No. A-10. Defendants therefore maintain that an impact statement cannot be prepared and made public until after the President has transmitted the budget proposal to Congress. Defendants claim that budget information is privileged under the Freedom of Information Act (FOIA), exemption 5.

Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), covers "inter-agency or intra-agency memorandums

or letters which would not be available by law to a private party in litigation with the agency."

In *EPA* v. *Mink*, 410 U.S. 73 (1973), a landmark case in construing exemption 5, the court considered the legislative history of exemption 5 and concluded that "Congress intended to incorporate generally the recognized rule that confidential intra-agency advisory opinions . . . are privileged from inspection." The court noted that the exemption was intended to protect the deliberative or policy-making processes of government. Thus, for purposes of applying exemption 5, a distinction is drawn between "predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Board* v. *Grumman Aircraft*, U.S. Supreme Court (April 28, 1975) slip op. p. 15.

Appropriation proposals are a type of communication made after the budget decision has been made or the policy already adopted, and hence "their disclosure raises a negligible risk of denying to agency decision-makers the uninhibited advice which is so important to agency decisions." *NLRB* v. *Sears, Roebuck & Co.*, U.S. Supreme Court, (April 28, 1975) slip op. p. 17, fn. 19. Budget appropriation requests are thus the final product in the agency's decision-making process with regard to budgets, and as such, cannot be termed pre-decisional. Final decisions are

disclosable under the FOIA. Since budget appropriation requests are final and cannot be termed predecisional, the Court concludes that such appropriation requests, whether made by the Department of the Interior or the Office of Management and Budget, both of which are federal agencies, are not privileged from disclosure under exemption 5 of the FOIA. *A fortiori*, environmental impact statements accompanying budget requests, are also not protected from disclosure under exemption 5. Whether hardship or inconvenience may result, requests for relief should be addressed to the Congress, not to the courts.

Finally, defendants assert that their proposed programmatic statement will serve as the equivalent impact statement.

Defendants are preparing such a draft statement which will discuss the entire operation and administration of the Refuge System, including funding alternatives. The final programmatic statement is planned to be completed by November, 1975. Accordingly, defendants argue plaintiffs' complaint is premature and ask the Court to stay this case pending completion of the final programmatic statement.

Admittedly, the programmatic statement is designed to provide an overview of the Refuge System and will only secondarily emphasize the environmental impacts on the system of budget requests. Although the programmatic statement will serve as the foundation for subsequent environmental analyses and for supplemental impact statements, the statement will only be "periodically updated" with no definite time frame mentioned for revision.

Like the court in *Natural Resources Defense Council, Inc.* v. *Morton, supra,* we are convinced that the programmatic statement is "insufficient to fulfill the purpose defined for an impact statement." The programmatic statement is designed to consider the general long-range goals of the Refuge System whether or not such goals are being considered by defendants in developing appropriation proposals. The programmatic statement is thus directed at a different subject than the environmental impact statement and cannot serve as a substitute. "A programmatic statement may be very helpful in assessing recurring policy issues and insuring consideration of the cumulative impact that numerous decisions might have on the environment, but that does not mean that it will suffice to fulfill the NEPA mandate. The Court is convinced that the . . . programmatic statement alone, . . . does not permit the 'finely tuned and systematic balancing analysis' mandated by NEPA." *Natural Resources Defense Council, Inc.* v. *Morton, supra.*

For the foregoing reasons plaintiffs are granted summary judgment because there is no genuine issue as to any material facts, and the plaintiffs are entitled to judgment as a matter of law. An appropriate order has been entered.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

June 6, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil 74-1017

No. 75-1871

[Filed May 15, 1978]

SIERRA CLUB, et al., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of The Interior, and JAMES T. LYNN, Director of Office of Management and Budget, et al., APPELLANTS

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, LEVENTHAL and MACKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part and the case is remanded to

the District Court for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam for the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 15, 1978

Opinion for the Court filed by Circuit Judge Leventhal.

Opinion filed by Circuit Judge MacKinnon, concurring in part and dissenting in part.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1017

[Filed June 6, 1975]*

SIERRA CLUB, *et al.*, PLAINTIFFS,

v.

ROGERS C. B. MORTON, *et al.*, DEFENDANTS.

ORDER

This matter came before the Court on the parties' cross-motions for summary judgment, and defendants' alternative motion for a stay of proceedings, and the Court, having considered the parties' supporting memoranda of points and authorities and the exhibits, and having heard oral argument, it is hereby this 6th day of June, 1975,

ORDERED, that plaintiffs' motion for summary judgment for declaratory relief is granted on the grounds that the National Environmental Policy Act, 42 U.S.C. 4231, *et seq.* requires:

(1) Defendants to prepare, consider, and disseminate environmental impact statements on annual proposals for financing the National Wildlife Refuge System;

* The district court stamped this order as filed on May 6, 1975. The correct filing date was June 6, 1975.

(2) Defendant Director of the Office of Management and Budget to develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated.

Since defendants have not prepared, considered, or disseminated environmental impact statements concerning their proposals for financing the National Wildlife Refuge System and defendant Director of the Office of Management and Budget has not developed the requisite formal methods and procedures, they are in violation of the National Environmental Policy Act and plaintiffs are entitled to declaratory relief; and it is further

ORDERED, that plaintiffs' motion for summary judgment for injunctive relief as to the defendants' violation of the National Environmental Policy Act be, and the same hereby is, granted; and it is further

ORDERED, that the motion of defendants for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, that defendants' alternative motion for a stay of proceedings be, and the same hereby is, denied; and it is further

ORDERED, that this case is hereby dismissed.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, et al., PLAINTIFFS,

v.

ROY L. ASH, DEFENDANT.

Civil Action No. 1017-74

AFFIDAVIT OF DONALD E. CRABILL

DONALD E. CRABILL, being duly sworn, state that to the best of my knowledge and belief:

1. I am employed by the Office of Management and Budget (OMB) as a Deputy Associate Director. The Natural Resources Division of OMB, which I head consists of three Branches, one of which is the Interior Branch. This Branch is responsible for making recommendations to the Director of OMB in the preparation of the President's budget, the preparation of supplemental budget requests, the review of program and financial plans, the apportionment of appropriated funds, and other methods of budget control and program review for certain bureaus within the Department of the Interior, including the Fish and Wildlife Service. The Interior Branch consists of seven professional employees, including a Branch Chief. The examination and review of the Fish and Wildlife Service budget has been, and is now, one part of the assignment of a single budget examiner.

2. The budgetary process is the means by which the President and the Congress decide how available fiscal resources shall be allocated in a particular year to carry out programs and projects already approved.* To the extent that NEPA is applicable to such programs, it logically applies at the time the substantive legislation is proposed rather than at the time annual funding is requested or provided.

3. Most agencies begin their budget preparation at the field station level. At each higher level in the organization, the budget estimates and program levels are reviewed and revised based on successively broader viewpoints and considerations. The final stage of review is the Presidential level. The President has final executive responsibility for the Federal programs and the budget requests which finance them. From the national perspective, the President (utilizing OMB) must decide between the competitive and sometimes conflicting wants of the agencies, and recommend appropriations to meet national problems based upon his perception of required priorities. This involves review of all agency programs, literally thousands. Many programs are interrelated in that a decrease in one can be offset by an increase in a related one. Moreover, in a certain sense, all programs are interrelated since an increase in funding in one area must result in a decrease elsewhere since

* E.g., Migratory Bird Conservation Act, 16 U.S.C. 715-715s (1929); Fish and Wildlife Act of 1956, 16 U.S.C. 7429-742j; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee, supp. IV, 1965-1968.

resources are finite. Obviously, to quantify in detail the potential environmental consequences of every budget decision on every program (not to mention every funding option considered prior to the final funding decision) is an absolute impossibility, even disregarding the severe time limitations imposed on OMB (explained below).

4. The schedule for formulating the President's budget recommendations to Congress is outlined in the document "Major Steps in the Budgetary Process" * * *. The budget for the Department of the Interior (Interior), like that of other agencies, is developed in a very short time frame as indicated by that schedule. The time sequence, set forth in detail in OMB Circular A-11 * * * can be briefly described as follows: In mid-summer, a planning letter is sent to the Secretary of the Interior by the Director of OMB, containing tentative overall figures for Interior in order to guide its budgeting. * * * The Secretary of the Interior's recommendations to the President are transmitted via the Office of Management and Budget (OMB) in early October (October 2 for the 1976 fiscal year (FY 1976)). In the following few weeks, OMB staff, in consultation with Interior, examines Interior's estimated needs.

OMB staff then identifies the major areas in which changes in program policy or in funding policy will be required. Alternative courses of action and their effects are identified and discussed with the OMB Director at "Director's Review". During the end of November, after Director's Review has been com-

pleted, tentative recommendations to the President are determined by the Director of OMB, taking into account both the individual needs of Interior and the total set of priorities government-wide; these tentative budget recommendations are then informally "passed back" to Interior (on November 20 for FY 1976) for the consideration of the Secretary. This step is discretionary with the President and the Director of OMB; in some years it has been omitted.

In early December (December 2 for FY 1976), the Director of OMB presents budget alternatives for Interior to the President for his review and decision. Presidential decisions are communicated to the Secretary, and should he wish to disagree with them, a meeting between the President, the Secretary, and the Director of OMB is held at the discretion of the President to resolve differences. For FY 1976 there were no such disagreements as to the Fish and Wildlife Service budget.

This tight schedule for budget review from October to December is necessitated by several factors: first, prior to determining its needs for the upcoming fiscal year, an agency should know the actual figures for the past fiscal year to make more accurate assessments of budget needs. These figures for the preceding year are not usually available until September. Second, by law (31 U.S.C. Section 11) the President's Budget must be submitted during the first fifteen days of each regular session of Congress (i.e., middle or late January). Third, time must be allotted in January for the final printing of the Budget and

related documents. To prepare environmental analyses for each budgetary option considered for each program, to provide for public comment on such analyses and then to make new budget decisions is patently impossible within the time constraints imposed by the above factors. If complete details on environmental impacts were submitted to OMB during budget formulation, other equally important considerations (such as cost and benefits) could not be thoroughly evaluated due to a dearth of time and manpower. It should be added that under the recently enacted Congressional Budget Impoundment and Control Act of 1974 (P.L. 93-344) the fiscal year is altered, ending on September 30 rather than the present June 30. Therefore, it will become even more difficult to formulate a budget prior to January because complete figures on programs of the prior fiscal year will be unavailable until late in December.

5. Funding for the Wildlife Refuge System is not set forth as a discrete budgetary item within the relevant general category of the Fish and Wildlife Service (formerly the Bureau of Sport Fisheries and Wildlife). Operation of refuges is largely funded from a Treasury account entitled "Resource Management", one of several accounts from which the Fish and Wildlife Service is funded. This account is then subdivided into generic activities. * * *

Prior to FY 1974, Wildlife Refuges was a discrete activity within the Budget. At that time, however, two accounts were consolidated and the activity

structure was modified at the request of Interior. The Activity structure was changed in order to more efficiently budget for total programs conducted by the Fish and Wildlife Service, as opposed to budgeting based upon organizational units; that is, refuges, research, and other activities conducted by the Service are not ends in themselves, but contribute to the goal of improved management of wildlife resources. Thus, several of the activities now concern wildlife refuges. One such program activity, "Wildlife Resources", includes funds for all activities relating to wildlife, not just Refuges. Similarly, the activity "Interpretation and Recreation" includes funds not only for visitor recreation at Refuges, but for Fish Hatcheries also. Some funds for the Refuge System do not come from "Resource Management" but from "Construction and Anadromous Fish", a separate account for the Fish and Wildlife Service. Again, the "Construction" budget covers more than Refuges alone. When the 1971 budget was printed, the new activity structure was used, and the prior two fiscal years were shown on that basis. Other years were not translated to the new activity listing, making comparison of budget years before and after 1972 extremely difficult, if not impossible.

It should be noted that there are many possible ways of displaying information in the budget, and that no single way has been found that satisfies all potential uses, or potential users. Nevertheless a display is selected for support by agency accounting sys-

tems, and requests for alternative displays must be met by ad-hoc data collection and estimating exercises.

6. An agency's budget recommendations (referred to in paragraph 2, supra) describe briefly what programs are included in the appropriation level for the current year (the so-called "base amount"). Major emphasis is placed on the incremental changes and the justifications for these requested decreases or increases. (E.G., see page 26, Interior's fiscal year 1975 budget estimates for the Fish and Wildlife Service, Exhibit 5, prepared as directed by OMB Circular A-11 * * *.

Partly due to the severe time constraints for budgetary review, and partly due to the presumption that a program, once authorized by law will continue at least until legal authorization expires, budget figures are necessarily based on the previous years appropriations and often only the *changes* from the current year can be examined in depth. Consequently, the budget for a particular account affecting the rate, timing and intensity of an activity will ordinarily change incrementally, not radically. This describes the formulation of the budget category encompassing wildlife refuges.

7. Resource Management, the primary account from which Wildlife Refuge expenditures come, has shown incremental increases for the past few years. These increases are reflected in each of its "activities", save for a relatively minor exception in FY

1974.* Because Wildlife Refuges is not a separate account, these figures do not clearly establish that their funding has increased. However, an increase in the broad account is presumptive evidence of an increase in a major program (i.e., Wildlife Refuges) within that account.

8. After the President transmits his Budget to the Congress, the Appropriations Committees hold hearings on appropriations bills; these hearings are the traditional forum for public input into the budgetary process. Nevertheless, OMB officials do meet with interested individuals and groups at their initiative to discuss their budget priorities and programs. The correspondence between one of the plaintiffs and former Associate Director of OMB Frank

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*

Budget Authority
Resources Management
($ in Thousands)

	1972 [1]	1973 [1]	1974 [2]	1975 [2]	1976 [2]
	Actual	Actual	Actual	Estimate	Estimate
Hab. Pres.	8,553	11,520	12,058	16,658	21,058
Wld. res.	30,355	34,674	38,549	45,220	45,431
Fish res.	18,263	19,663	21,502	23,763	24,059
E.J	3,192	4,135	4,265	5,480	7,180
I&R	5,433	6,005	5,095	6,117	6,117
Admin.	2,760	3,227	3,462	3,888	4,015
Total	68,556	79,284	86,172	101,126	107,860

[1] Source, Budget Appendix, 1974, 1975.

[2] Source, Budge Appendix forthcoming for FY 1976.

It should be noted that the President's proposal for a minor decrease in funds for one activity was rejected by Congress, which added $250,000, thereby increasing all activity numbers.

Zarb following an invitation by OMB to meet and discuss the FY 1976 budget * * * is evidence of but one instance of OMB's desire to have public input in the budget process. The public is free to suggest and to justify its own set of program priorities to OMB officials.

Budgetary recommendations made by the agency heads to the President and by the Director of OMB to the President are treated as confidential information prior to the transmission of his recommended Budget to the Congress. (See OMB Circular A-10, * * *). Thus, specific figures are not revealed in discussions which OMB may hold with the public. However, once the budget recommendations of the President are transmitted to Congress, the proposed budget is a public document. It is distributed to the public, deposited in libraries, and available for sale. This document explains the major priorities (economic, social, environmental, and others) that the President recommends, and sets forth in detail the proposed uses of Federal moneys. This document, and additional more detailed material prepared by each agency, serves as a basic body of information on which interested parties can build a case for proposing changes to the Congress during their public hearings and deliberations on the president's recommendations. Even the hitherto confidential recommendations made by the agency head to the President may be revealed in the Appropriations Hearings process (see, e.g. Dept. of Interior (p. 24) Approp. Hearings, House Sub. Comm. on DOI and Related Agen-

cies Appropriations for 1975, Part 4, 93d Cong. 2d Sess. (1974)).

/s/ Donald E. Crabill
DONALD E. CRABILL

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

The foregoing affidavit was subscribed and sworn to before me on this 13th day of January, 1975.

/s/ Albert E. Brown
Notary Public
District of Columbia

My Commission expires May 31, 1979

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 74-1017

SIERRA CLUB, 1050 Mills Tower, 220 Bush Street, San Francisco, California 94104; NATIONAL PARKS AND CONSERVATION ASSOCIATION, 1701 18th Street, N.W., Washington, D.C.; and NATURAL RESOURCES DEFENSE COUNCIL, INC., 15 West 44th Street, New York, New York, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary of the U. S. Department of the Interior; and ROY L. ASH, Director of the U. S. Office of Management and Budget, DEFENDANTS

AFFIDAVIT

ROYSTON C. HUGHES, having been first duly sworn, deposes and states:

1. That he is Assistant Secretary of the Interior for Program Development and Budget.

2. That the Office of the Assistant Secretary, Program Development and Budget, under the provisions of Part 110.1.5 of the Department of the Interior Manual, discharges certain duties of the Secretary of the Interior, and exercises authority over and coordinates Department-wide processes related to, *inter alia*, budget management, comprehensive planning,

policy analysis, and economic analyses of Departmental programs.

3. That there has been a consistent pattern in Departmental budgeting procedures for the past two fiscal years (FY 1975 and 1976); and that Secretary of the Interior Rogers Morton has indicated his intention to continue to use similar procedures.

4. That, regardless of what procedure the Department follows internally in the preparation of its budget proposals, in February of the year preceding the year when the budget request is to be submitted to Congress, the Secretary of the Interior initially receives, from the Director of the Office of Management and Budget, an overall planning figure representing that Office's tentative suggestion as to the appropriate level for the Departmental budget for that fiscal year.

5. That the Department's proposals, together with written justifications therefor, must be transmitted to the Office of Management and Budget by September 30 of the year preceding the year in which the requests are submitted to Congress.

6. That because of the time consumed in writing and printing the justifications sent to the Office of Management and Budget by mid-September must be decided upon by the Department no later than the end of August of the year preceding the year in which they are to be submitted to Congress.

7. That the procedure, which the Department of the Interior has followed with respect to fiscal year 1975 and fiscal year 1976, commenced in February of the year preceding the year in which the Budget

requests are to be submitted to Congress, with Secretary Morton analyzing the figure suggested him by the Office of Management and Budget in February and then suggesting to each of his Assistant Secretaries general policy planning guidance and target budget amounts for each bureau in their respective areas of responsibility; and that, in addition, the Secretary at this time requested each of his Assistant Secretaries to prepare a "Program Strategy Paper" which would address Departmental priorities and policy guidance and would indicate the general manner in which the Assistant Secretaries intended to meet the tentative target budget amounts.

8. That the Secretarial actions discussed in paragraph 7 took place in March of the year preceding the year in which the budget requests were to be submitted to Congress; and that the Assistant Secretaries were requested to submit their "Program Strategy Papers" no later than mid-May of the same year.

9. That, following receipt by the Secretary of the Interior of the Assistant Secretaries' "Program Strategy Papers" * * * in mid-May, the Office of the Assistant Secretary for Program Development and Budget, in coordination with the appropriate Assistant Secretaries, prepared a series of "Secretarial Issue Papers" * * * which reviewed and analyzed the choices and issues presented by the limitations implicit in the Secretarially allocated target budget amounts.

10. That the "Secretarial Issue Papers" mentioned in the preceding paragraph were completed by early July of the year preceding the year in which the budget requests were submitted to Congress.

11. That, upon completion of the "Secretarial Issue Papers" the Secretary proceeded, in July, to hold a series of budget conferences with his Assistant Secretaries and the heads of the Department's bureaus and offices, including the Director of the United States Fish and Wildlife Service, to discuss the priorities and issues which were presented by each Assistant Secretary's "Strategy Papers."

12. That, on the basis of these conferences, the Secretary, in the first week of August, sent to each of his Assistant Secretaries a new tentative allocation of the Department's budget, noting that these allocations could be appealed until mid-August.

13. That, on the basis of the entire foregoing process, including any appeals filed, final decisions by the Secretary as to the allocations which the Department would recommend to the Office of Management and Budget were completed by the end of August; that these decisions were transmitted to the responsible Assistant Secretaries when they were made, with the instruction that the Assistant Secretaries, bureaus and offices, should prepare, by the end of the first week in September, draft budget estimates and, reflective of the decisions, justifications.

14. That, the draft budget estimates and justifications were, when prepared, sent to the Department's

Office of Budget, which had approximately five days to review the documents prior to their being printed.

15. That, after printing, the entire budget submission for the Department of the Interior * * * was transmitted to the Office of Management and Budget for review on approximately the last day of September.

16. Following the transmission of the budget documents to the Office of Management and Budget, the personnel of the Department of the Interior and of the Office of Management and Budget with responsibilities in specific program areas conferred as to the proposed budget allowances and justifications.

17. That, following the conferences noted in the preceding paragraph, the Office of Management and Budget transmitted to the Department of the Interior, in late November or early December, the budget allowance for each Bureau and Office which were to be transmitted to Congress as part of the President's budget.

18. That in the several weeks following the transmission noted in the preceding paragraph, the Secretary of the Interior, using the recommendations of his Assistant Secretaries, had the opportunity to appeal the budget allowances transmitted by the Office of Management and Budget; and that by the end of December all budget allowances were finalized, and requests and justifications were prepared for transmission to Congress in mid-January.

19. That prior to the budgeting process for fiscal year 1975, the Department of the Interior operated

within the basic March through August timeframe discussed in various paragraphs above, but used budgeting and reviewing procedures different from those employed in fiscal years 1975 and 1976.

20. That, because decisions as to the Departmental budget are not tentatively made until early December, are not finally made until late December, and are transmitted to Congress in mid-January, and because both during the year before and the month after those decisions are made the budgeting process travels, under extreme time pressure, between different levels of the Department's and Executive Branch's organization, the compilation of an environmental impact statement, on an annual basis, covering such requests, and the circulation of such a statement within the frameworks established by the Guidelines of the Council on Environmental Quality, would be extremely disruptive of the Department's budgeting processes.

ROYSTON C. HUGHES
Assistant Secretary, Program
Development and Budget
U.S. Department of the Interior

Subscribed and sworn to before me, a Notary Public for the District of Columbia, this —— day of January, 1974.

_____

Notary Public

My Commission expires: _____

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